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No. 12515

2635

United States
Court of Appeals
For the Ninth Circuit.

RALPH BARRY, as Trustee in Bankruptcy of
CENTRAL AUTO SUPPLY COMPANY, a
Corporation, Bankrupt,

Appellant.

vs.

LAWRENCE WAREHOUSE COMPANY, a Cor-
poration, and THE VALLEY NATIONAL
BANK OF PHOENIX, a National Banking
Association,

Appellees.

Transcript of Record

Appeal from the United States District Court
District of Arizona.

FILED

MAY 23 1950

PAUL P. O'BRIEN,
CLERK

No. 12515

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Appellee
Valley National Bank.

In the United States District Court
for the District of Arizona

No. Civ 1102 Phx.

RALPH BARRY as Trustee in Bankruptcy of
Central Auto Supply Company, a Corporation,
Bankrupt,

Plaintiff,

vs.

LAWRENCE WAREHOUSE COMPANY, a Cor-
poration, and THE VALLEY NATIONAL
BANK OF PHOENIX, a National Banking
Association,

Defendants.

COMPLAINT

(Action to avoid illegal transfer of person-
alty and to recover possession—jurisdiction
asserted under Section 70 of the Bankruptcy
Act; 11 U. S. C. Chap. 7, Sec. 110)

Plaintiff alleges:

I.

Central Auto Supply Company is a corporation
duly organized and existing under the laws of the
State of Arizona. On July 22, 1947, said Central
Auto Supply Company was duly adjudicated a
bankrupt in and by this court. Thereafter plaintiff,
Ralph Barry, was duly appointed as trustee of said
bankrupt and its estate, and he duly qualified as

such and is now the duly qualified and acting trustee in bankruptcy of said bankrupt corporation and its estate. He has been duly authorized by the Referee in Bankruptcy, to whom said bankruptcy proceeding was duly referred, to bring and prosecute this action. Defendant Lawrence Warehouse Company is a corporation duly organized and existing under the laws of the State of California and duly licensed to transact business within the State of Arizona. Defendant The Valley National Bank of Phoenix is a national banking association duly organized and existing under the laws of the United States of America and having its principal place of business at Phoenix in the State of Arizona.

II.

At all times herein mentioned, to and until its adjudication as a bankrupt as aforesaid, said Central Auto Supply Company was engaged in business as a merchant and maintained its place of business at 601-603 East Adams Street in Phoenix, Maricopa County, Arizona. At all such times said Central Auto Supply Company was the owner of a stock of goods, wares and merchandise which it kept and maintained at its place of business aforesaid and daily exposed the same to sale in parcels in the regular course of its merchandise business aforesaid.

III.

For the purpose of attempting to create a lien upon, or transfer of interest in, said entire stock

of goods, wares and merchandise, in violation of the provisions of Section 62-522 of the Arizona Code of 1939, the said Lawrence Warehouse Company did, prior to the adjudication of said Central Auto Supply Company as a bankrupt as aforesaid, issue to said Central Auto Supply Company certain documents in the form of warehouse receipts, wherein and whereby said Lawrence Warehouse Company recited that said stock of goods, wares and merchandise was held by it in storage for said Central Auto Supply Company, and said Central Auto Supply Company did assign and deliver said so-called warehouse receipts to said The Valley National Bank of Phoenix as attempted security for loans by said Bank made to said Central Auto Supply Company. At all times thereafter, to and until its adjudication in bankruptcy as aforesaid, said Central Auto Supply Company remained in the actual and physical possession of said goods, wares and merchandise and had the actual control and merchandising and sale thereof and did actually make daily sales therefrom.

IV.

At or shortly subsequent to said adjudication in bankruptcy, said The Valley National Bank of Phoenix and said Lawrence Warehouse Company placed locks upon the place of business of said Central Auto Supply Company hereinbefore referred to and caused the same to be locked, and they have at all times since refused to permit the plaintiff to

have the actual or physical possession of said goods, wares and merchandise or any part thereof, although plaintiff is vested with the title thereto and the right of possession thereof under Section 70 of the Act of Congress relating to bankruptcy, as amended.

V.

The actual value of said goods, wares and merchandise is, as plaintiff is informed and believes and therefore alleges, the sum of forty-three thousand dollars.

Wherefore, plaintiff demands judgment:

1. Adjudging that said defendants are not, nor is either of them, entitled to the possession of said properties in whole or in part and directing the delivery of such properties to this plaintiff, or, in the alternative, if said properties cannot be so delivered by said defendants that plaintiff recover the value thereof, to wit the sum of forty-three thousand dollars, from the defendants and each of them;
2. For plaintiff's costs herein incurred;
3. For such other and further relief as the court shall find proper in the premises.

DAVID E. WILSON,
ALLAN K. PERRY,

Attorneys for Plaintiff.

By /s/ ALLAN K. PERRY.

[Endorsed]: Filed September 9, 1947.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now, Lawrence Warehouse Company, and answering the Complaint herein on file, admits, denies and alleges as follows, to wit:

I.

Admits the allegations of paragraph I of plaintiff's complaint.

II.

Answering paragraph II, this answering defendant admits that to and until the adjudication of Central Auto Supply Company, in bankruptcy, said company was engaged in business as a merchant and maintained a place of business at 601-3 East Adams Street, in Phoenix, Arizona. Except for such admission, this defendant denies, each and every, all and singular the allegations of said paragraph II.

III.

Answering paragraph III, this answering defendant alleges that long prior to the adjudication of Central Auto Supply Company, as a bankrupt, said Central Auto Supply Company transferred to Lawrence Warehouse Company certain goods, wares and merchandise and that said Lawrence Warehouse Company took the same into its possession and placed the same in its own premises, which premises and goods were at that time and at all

times thereafter under the sole and exclusive control of employees of Lawrence Warehouse Company; that at the time that said Central Auto Supply Company delivered said goods to Lawrence Warehouse Company and at the request of said Central Auto Supply Company, Lawrence Warehouse Company issued its non-negotiable warehouse receipts in accordance with the uniform Warehouse Receipts Act of the State of Arizona to defendant, The Valley National Bank of Phoenix, and thereafter and at all times to and including the date hereof, Lawrence Warehouse Company has retained the exclusive and absolute possession of said goods, wares and merchandise, subject to the written order of The Valley National Bank of Phoenix.

Further answering said paragraph III, this answering defendant denies that said transfer was in violation of the provisions of Section 62-522 of the Arizona Code of 1939, or to any law or any section of said code, and denies that prior to the adjudication of said Central Auto Supply Company, as a bankrupt, or at any other time, it issued to said Central Auto Supply Company certain documents in the form of warehouse receipts or in any other form, wherein and whereby said Lawrence Warehouse Company recited that said stock of goods, wares and merchandise were held by it in storage for said Central Auto Supply Company, and further denies that said Central Auto Supply Company did assign and deliver said so-called warehouse receipts to The Valley National Bank of Phoenix, or any other person or persons, and fur-

ther denies that at all times thereafter, or at all, after the date of the delivery of said goods, wares and merchandise to Lawrence Warehouse Company said Central Auto Supply Company, or any other person or persons, except Lawrence Warehouse Company remained in actual or physical possession of said goods, wares and merchandise or had the actual control or merchandising or sale thereof, or did actually make daily sales therefrom, except that this answering defendant alleges that from time to time upon written instructions of defendants, The Valley National Bank of Phoenix, and in accordance with the Warehouse Receipts Act, and the warehouse receipts issued to said Bank, this answering defendant delivered from the warehouse certain designated and described merchandise.

IV.

Denies each and every, all and singular, the allegations of paragraph IV of plaintiff's complaint, except only that this defendant admits that it has refused to permit plaintiff to have the actual or physical possession of the goods, wares and merchandise, or any part thereof now stored in the warehouse of Lawrence Warehouse Company; and in this respect this defendant further alleges that at all times since it acquired the premises upon which it maintains the warehouse for the storage of the goods, wares and merchandise herein involved, it has maintained and now does maintain the sole and exclusive possession of said premises and said goods and has kept and now does keep the said premises

locked with its own locks to which only its own employees have had keys, and that at all times when said employee or employees of defendant, Lawrence Warehouse Company, were and are not present said premises have remained and now remain locked with said locks.

V.

This answering defendant has no information or belief sufficient to enable it to answer the allegations of paragraph V of plaintiff's complaint, and basing its denial upon such lack of information and belief, denies each and every, all and singular, said allegations.

Wherefore, defendant prays judgment that plaintiff's complaint be dismissed hence; that defendant have judgment for its cost of suit herein incurred, and for such other and further relief as to this court may seem meet and proper in the premises.

FENNEMORE, CRAIG,

ALLEN & BLEDSOE,

By /s/ WALTER E. CRAIG.

WILLIAMSON & WALLACE,

By /s/ WILLIAM R. RAY.

State of California

County of Los Angeles—ss.

E. C. Yuille, being duly sworn, deposes and says:

That he is an officer, to wit, the Vice-President of Lawrence Warehouse Company, a corporation,

defendant named in the foregoing Answer to Complaint, and as such officer of said corporation makes this verification for and on its behalf; that he has read said Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

/s/ E. C. YUILLE.

Subscribed and sworn to before me this 11th day of October, 1947.

[Seal] /s/ FLORENCE LEWENTHAL,
Notary Public in and for the City and County of
Los Angeles, State of California.

My Commission Expires Dec. 5, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed October 15, 1947.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, THE VALLEY
NATIONAL BANK OF PHOENIX

Comes Now the defendant, The Valley National Bank of Phoenix, a national banking association, and for its answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Said defendant admits the allegations contained in paragraph I of plaintiff's complaint.

II.

In answer to Paragraph II of plaintiff's com-

plaint, this defendant admits that Central Auto Supply Company was engaged in business as a merchant and maintained a place of business at 601-603 East Adams Street, in the City of Phoenix, Maricopa County, Arizona. Except for such admission, this defendant denies each and every allegation contained in paragraph II.

III.

This defendant denies each and every allegation contained in paragraph III of plaintiff's complaint, and in this connection alleges as follows: that prior to its incorporation under the laws of the State of Arizona Central Auto Supply Company was a co-partnership, doing business in the City of Phoenix, Maricopa County, Arizona, under the name and Style of Central Auto Supply; that Central Auto Supply Company, a corporation, succeeded to the interest of said co-partnership; that the defendant, Lawrence Warehouse Company, is engaged in the business of field warehousing and in the course of its business said Lawrence Warehouse Company entered into a certain agreement with the Central Auto Supply, and upon organization of the corporation, Central Auto Supply Company, said Lawrence Warehouse Company entered into a further agreement with said corporation, under the terms of which said Lawrence Warehouse Company leased certain premises at 601 East Adams Street, in the City of Phoenix, Arizona, and took possession of said premises pursuant to the terms of said lease and at all times mentioned

in plaintiff's complaint, said Lawrence Warehouse Company was, and now is, in the possession of the said premises.

That this defendant, The Valley National Bank of Phoenix, said Lawrence Warehouse Company, and said Central Auto Supply, a co-partnership, entered into a certain pledge and warehouse agreement, under the terms of which certain goods, wares and merchandise were placed in the sole and exclusive possession of said Lawrence Warehouse Company and stored on the premises held by it under said lease. That pursuant to the terms of said agreement and the instructions of said Central Auto Supply, certain warehouse receipts were issued, pursuant to the Warehouse Receipt Act of the State of Arizona, in Section 52-801 et seq., Arizona Code 1939, to The Valley National Bank of Phoenix.

That after the organization of said corporation, said agreement between this defendant, said Lawrence Warehouse Company and said Central Auto Supply was extended by agreement of all of said parties to said Central Auto Supply Company, a corporation, which had succeeded to all of the property, interest and business of said Central Auto Supply, a former co-partnership.

That at all times herein mentioned, the goods, wares and merchandise, the possession of which is claimed by the plaintiff in his complaint, have been in the actual and exclusive physical possession and control of said Lawrence Warehouse Company, and this defendant, The Valley National Bank of

Phoenix, has held warehouse receipts issued by said Lawrence Warehouse Company to this defendant for all of the goods, wares and merchandise stored in said warehouse. That this defendant now owns and holds warehouse receipts No. 69891 to No. 69900, both inclusive, No. 72851 to No. 72859, both inclusive, and No. 72861, No. 72862, No. 72864 and No. 72865; that all of said warehouse receipts were issued to this defendant for monies actually loaned to said Central Auto Supply or said Central Auto Supply Company, a corporation.

The amount now owed to this defendant by said Central Auto Supply Company, a corporation, on July 21, 1947, was Thirty-one Thousand One Hundred Fifty-five and 84/100 Dollars (\$31,155.84), which amount has since been reduced to the sum of Thirty thousand Eight Hundred Thirty-five and 33/100 Dollars (\$30,835.33) by the payment to this defendant, by the receiver of said Central Auto Supply Company, a corporation, of the sum of One Hundred Ninety-two and 20/100 (\$192.20), for which merchandise, upon the instructions of this defendant, was released from said warehouse and delivered to said receiver.

IV.

Answering paragraph IV of plaintiff's complaint, this defendant denies each and every allegation therein contained, and in this connection alleges that the goods, wares and merchandise referred to in plaintiff's complaint were in the possession of the defendant, Lawrence Warehouse Company, long prior to the bankruptcy of Central

Auto Supply Company, a corporation, and at all times since the first taking possession thereof by the said Lawrence Warehouse Company as a warehouseman, and said warehouseman has made no delivery of any thereof to any person whomsoever, except upon the order of this defendant, as the holder of warehouse receipts issued on said goods, wares and merchandise; that this defendant is informed and believes and upon such information and belief states that on August 30, 1947, there was due and owing from said Central Auto Supply Company, a corporation, to said warehouseman the sum of Two Thousand One Hundred Ninety Seven and 71/100 Dollars (\$2,197.71) for services rendered in the storing and warehousing of said goods, wares and merchandise.

V.

This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph V of plaintiff's complaint.

Wherefore, this defendant prays judgment that plaintiff take nothing by his complaint and that this defendant have and recover its costs.

GUST, ROSENFELD,
DIVELEBESS, ROBINETT
& LINTON,

By /s/ J. L. GUST,
Attorneys for Defendant, The Valley National Bank
of Phoenix.

Receipt of Copy attached.

[Endorsed]: Filed October 15, 1947.

[Title of District Court and Cause.]

MINUTE ENTRY

Thursday, March 17, 1949

Honorable Dave W. Ling, United States District Judge, Presiding.

This case come on regularly for trial this day. The plaintiff, Ralph Barry, is present in person with his counsel, Allan K. Perry, Esq. Walter Craig, Esq. appears as counsel for the defendant, Lawrence Warehouse Company. John L. Gust, Esq., appears as counsel for the defendant, Valley National Bank. On motion of Walter Craig, Esq.,

It Is Ordered that William R. Ray be and he is admitted to practice specially in this case as associate counsel for the defendant, Lawrence Warehouse Company. Louis L. Billar is present as official reporter.

Both sides announce ready for trial.

Plaintiff's Case:

Robert E. Kersting is now duly sworn and examined on behalf of the plaintiff.

The following plaintiff's exhibits are now admitted in evidence:

Exhibit 1, Field Warehouse Lease.

Exhibit 2, Deposition of Harry Stock.

Exhibit 3, Deposition of C. D. Cadot.

Exhibit 4, Deposition of Paul S. Godber.

Exhibit 5, Deposition of J. C. Baldwin.

Exhibit 6, Deposition of E. R. Tolfree.

Exhibit 7, Deposition of F. A. Warburton, Jr.

Exhibit 8, Deposition of M. Blackburn.

Exhibit 9, Deposition of David Shapiro.

Exhibit 10, Deposition of F. C. Westphal.

Whereupon the plaintiff rests.

Walter Craig, Esq., now moves for judgment for the defendants due to plaintiff's failure to prove allegations of plaintiff's complaint.

It Is Ordered that said Motion be and it is denied.

Defendants' Case:

Defendant, Lawrence Warehouse Company's Exhibit D, Deposition of C. W. Saxon, is now admitted in evidence.

Harold A. Mitchell is now duly sworn and examined on behalf of the defendants.

Defendant, Lawrence Warehouse Company's Exhibit A, 10 photographs, is now admitted in evidence.

And thereupon, at the hour of 12:05 o'clock p.m., It Is Ordered that the further trial of this case be continued until 1:30 o'clock p.m., this date, to which time the parties and respective counsel are excused.

Subsequently, at the hour of 1:30 o'clock p.m., the parties and their respective counsel being present pursuant to recess, further proceedings of trial are had as follows:

Defendants' Case Continued:

Harold A. Mitchell, heretofore sworn, is now re-

called and further examined on behalf of the defendants.

Defendant, Lawrence Warehouse Company's Exhibit E, Warehouse receipt, is now admitted in evidence.

Defendant, Lawrence Warehouse Company's Exhibit F, Delivery form, is now admitted in evidence.

William H. Miller is now duly sworn and examined on behalf of the defendants.

Austin K. Wildman is now duly sworn and examined on behalf of the defendants.

William J. Riley is now duly sworn and examined on behalf of the defendants.

Whereupon, the Defendants rest.

Both sides rest.

It Is Ordered that the plaintiff be allowed 20 days in which to file opening brief, and that the defendant be allowed 10 days thereafter in which to file answering brief.

[Title of District Court and Cause.]

MINUTE ENTRY

Wednesday, October 5, 1949

Honorable Dave W. Ling, United States District Judge, Presiding.

It Is Ordered that the record show this case is now submitted and taken under advisement.

[Title of District Court and Cause.]

MINUTE ENTRY

Thursday, November 3, 1949

Honorable Dave W. Ling, United States District Judge, Presiding.

This case having been submitted and taken under advisement,

It Is Ordered that the defendants have judgment herein.

[Title of District Court and Cause.]

MINUTE ENTRY

Thursday, February 23, 1950

Honorable Dave W. Ling, United States District Judge, Presiding.

It Is Ordered that the Plaintiff's Motion for New Trial be and it is denied.

[Docketed]: Feb. 23, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

The above-entitled matter having come on for trial before the Court March 17, 1949, the plaintiff appearing in person and by his counsel, David E. Wilson and Allan K. Perry; and the defendant Lawrence Warehouse Company, a corporation, having ap-

peared by its counsel, Messrs. Fennemore, Craig, Allen and Bledsoe and William R. Ray; and the defendant Valley National Bank, Phoenix, a national banking association, having appeared by its counsel, Messrs. Gust, Rosenfeld, Divelbess, Robi-
nette & Linton; and evidence having been introduced by all parties to said action; and the matter having been submitted to the Court and memorandum briefs having been filed by all parties, and the Court being fully advised in the premises, finds as follows:

Findings Of Fact

I.

Long prior to filing its petition in bankruptcy Central Auto Supply Company transferred to Lawrence Warehouse Company for deposit certain goods, wares and merchandise.

II.

Said goods, wares and merchandise were deposited in the field warehouse of Lawrence Warehouse Company theretofore leased by it from Central Auto Supply Company, and remained in the possession and control of the said Lawrence Warehouse Company thereafter.

III.

At the time said goods, wares and merchandise were deposited with the said Lawrence Warehouse Company, that company issued certain uniform non-negotiable warehouse receipts at the direction

of the depositor, Central Auto Supply Company and in favor of the Valley National Bank, Phoenix, a national banking association.

IV.

Said uniform non-negotiable warehouse receipts were held by said bank as security for a loan in favor of Central Auto Supply Company.

V.

Said transactions were in conformity with the usual commercial practice known as field warehousing.

Conclusions Of Law

I.

The field warehouse lease between Central Auto Supply Company as lessor, and Lawrence Warehouse Company as lessee, dated July 30, 1946, was a valid existing contract between the parties thereto. The field warehouse storage agreement dated July 26, 1946, was a valid existing contract between the parties thereto. The pledge and warehousing agreement dated July 30, 1946, was a valid existing contract between the parties thereto. The field warehouse lease dated March 17, 1947, was a valid existing contract between the parties thereto. The field warehouse storage agreement dated May 23, 1947, was a valid existing contract between the parties thereto. The pledge and warehousing agreement dated March 17, 1947, was a valid existing contract between the parties thereto.

II.

The non-negotiable warehouse receipts issued by Lawrence Warehouse Company at the direction of the depositor, Central Auto Supply Company, in favor of the Valley National Bank, Phoenix, a national banking association, were valid warehouse receipts within the Arizona Uniform Warehouse Receipts Act, being Sections 52-801 through 52-849, Arizona Code 1939.

III.

The pledge of the non-negotiable warehouse receipts and the pledge of such goods, wares and merchandise deposited with Lawrence Warehouse Company as warehousemen in favor of the Valley National Bank, Phoenix, as security for a loan to the Central Auto Supply Company, was a valid pledge as between the parties thereto and as against the plaintiff herein as trustee in bankruptcy of the Central Auto Supply Company and as against third parties, general creditors or otherwise.

Wherefore, It Is Ordered, Adjudged and Decreed that plaintiff take nothing by his complaint, and defendants, and each of them, have their costs herein expended.

. Dated: January 17, 1950.

/s/ DAVE W. LING,

Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 13, 1949.

[Endorsed]: Filed and Docketed January 17, 1950.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO FINDINGS
OF FACT AND CONCLUSIONS OF LAW
PROPOSED BY DEFENDANTS.

I.

The plaintiff objects to the defendants' proposed finding of fact number I, for the reason that there is no evidence to support the same.

II.

The plaintiff objects to the defendant's proposed finding of fact number II, for the reason that there is no evidence to support the same.

III.

The plaintiff objects to the defendants' proposed finding of fact number III, for the reason that there is no evidence to support the same.

IV.

The plaintiff objects to the defendants' proposed finding of fact number IV, for the reason that there is no evidence to support the same.

V.

The plaintiff objects to the defendants' proposed finding of fact number V, for the reason that there is no evidence to support the same.

VI.

The plaintiff objects to the defendants' proposed conclusion of law number I, for the reason that the

same is contrary to the law applicable to the factual situation by the evidence presented.

VII.

The plaintiff objects to the defendants' proposed conclusion of law number II, for the reason that the same is contrary to the law applicable to the factual situation by the evidence presented.

VIII.

The plaintiff objects to the defendants' proposed conclusion of law number III, for the reason that the same is contrary to the law applicable to the factual situation by the evidence presented.

IX.

Based upon the admissions of the parties and the evidence adduced at the trial, plaintiff is entitled to the following findings of fact and he hereby requests the court to make and enter the same:

1. Central Auto Supply Company is a corporation, duly organized and existing under the laws of the State of Arizona. On July 22, 1947, said Central Auto Supply Company was duly adjudicated a bankrupt in and by this court. Thereafter plaintiff Ralph Barry was duly appointed as trustee of said bankrupt and its estate, and he duly qualified as such and is now the duly qualified and acting trustee in bankruptcy of said bankrupt corporation and its estate. He has been duly authorized by the Referee in Bankruptcy, to whom said bankruptcy proceeding was duly referred, to bring and prose-

cute this action. Defendant Lawrence Warehouse Company is a corporation duly organized and existing under the laws of the State of California and duly licensed to transact business within the State of Arizona. Defendant The Valley National Bank of Phoenix is a national banking association, duly organized and existing under the laws of the United States of America and having its principal place of business at Phoenix, within the State of Arizona.

2. At all times here material, to and until its adjudication as a bankrupt as aforesaid, said Central Auto Supply Company was engaged in business as a merchant, and maintained its place of business at 601-603 East Adams Street, in Phoenix, Maricopa County, Arizona. At all such times said Central Auto Supply Company was the owner of a stock of goods, wares and merchandise, which it kept and maintained at its place of business aforesaid, and daily exposed the same to sale in parcels in the regular course of its merchandise business aforesaid.

3. For the purpose of attempting to create a lien upon or transfer of interest in said entire stock of goods, wares and merchandise, in violation of the provisions of section 62-522 of the Arizona Code of 1939, said Lawrence Warehouse Company did, prior to the adjudication of said Central Auto Supply Company as a bankrupt as aforesaid, issue to said The Valley National Bank of Phoenix certain documents in the form of non-negotiable warehouse receipts, wherein and whereby said Lawrence

Warehouse Company recited that said stock of goods, wares and merchandise was held by it in storage for said The Valley National Bank of Phoenix as attempted security for loans made by said The Valley National Bank of Phoenix to said Central Auto Supply Company.

4. At all times thereafter, to and until its adjudication in bankruptcy as aforesaid, said Central Auto Supply Company remained in the actual and physical possession of said goods, wares and merchandise, and had the actual control and merchandising and sale thereof and did actually make daily sales therefrom.

5. The amount owing by Central Auto Supply Company to The Valley National Bank of Phoenix, as of the day of the date of its adjudication in bankruptcy herein, was thirty-one thousand one hundred fifty-five and $84/100$ dollars, which was reduced by the sum of one hundred ninety-two and $20/100$ dollars by the payment to said bank by the receiver of said Central Auto Supply Company of said sum of one hundred ninety-two and $20/100$ dollars leaving a balance owing by said bankrupt corporation to said bank of thirty thousand eight hundred thirty-five and $53/100$ dollars.

X.

Based upon the admissions of the parties and the evidence adduced at the trial, the court should make and enter the following conclusions of law:

1. The court has jurisdiction over the parties and of the subject matter, under the provisions of

Section 70 of the Bankruptcy Act, 11 U.S.C. Chapter 7, section 110.

2. The entire scheme of "field warehousing," as disclosed by the record, is contrary to and violative of the provisions of section 62-522 of the Arizona Code of 1939; and the lien or pledge of merchandise contemplated by such scheme is void as to general creditors of the bankrupt.

3. The plaintiff herein, as trustee in bankruptcy of Central Auto Supply Company, represents in this action the general creditors of the bankrupt.

4. Section 62-522 of the Arizona Code of 1939 was not repealed or modified, in whole or in part, by implication or otherwise, by the adoption of the uniform warehouse receipt act in Arizona.

5. The defendants are not, nor is either of them, entitled to the possession of the stock of goods, wares and merchandise, in whole or in part.

6. The plaintiff is vested with the title to said stock of goods, wares and merchandise, and the whole thereof, and the right of possession thereof, under the provisions of Section 70 of the Act of Congress Relating to Bankruptcy, as amended.

7. Plaintiff is entitled to judgment, as prayed in his complaint.

DAVID E. WILSON,

ALLAN K. PERRY,

Attorneys for Plaintiff.

By /s/ ALLAN K. PERRY.

[Endorsed]: Filed December 16, 1949.

[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR NEW TRIAL

Plaintiff moves the court to vacate the judgment rendered January 17, 1950, in the above-numbered and entitled action, and to grant a new trial of said cause, for the following reasons and upon the following ground:

1. The judgment rendered is not justified by the evidence and is contrary to law.

2. The court has not made adequate findings of fact upon the issues presented by the pleadings.

3. The findings of fact proposed by the defendant Lawrence Warehouse Company and signed by the District Judge do not warrant the conclusions of law so made and signed and do not support the judgment.

4. For all of the reasons set forth in the "Plaintiff's Objections to Findings of Fact and Conclusions of Law Proposed by Defendants," filed herein December 16, 1949, which is hereby referred to and by such reference incorporated into and made a part of this motion for new trial.

DAVID E. WILSON,
ALLAN K. PERRY,

Attorneys for Plaintiff.

By /s/ ALLAN K. PERRY.

Memorandum of Points and Authorities Relied
Upon in Support of the Foregoing Motion

In support of the foregoing motion, the plaintiff relies upon the argument and authorities contained in the "Brief on Behalf of the Plaintiff," heretofore filed herein and by reference made a part hereof.

[Endorsed]: Filed January 19, 1950.

[Title of District Court and Cause.]

PLAINTIFF'S NOTICE OF APPEAL

Notice Is Hereby Given that the plaintiff above named hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the judgment of the United States District Court for the District of Arizona, rendered and entered January 17, 1950, and from the whole of said judgment, and from the order of said District Court entered February 23, 1950, denying the plaintiff's motion for new trial.

/s/ ALLAN K. PERRY,
Attorney for Plaintiff.

[Endorsed]: Filed February 27, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
PLAINTIFF INTENDS TO RELY UPON
HIS APPEAL

The plaintiff above named, who, concurrently with the filing of this statement, has perfected an appeal to the United States Court of Appeals for the Ninth Circuit, from the judgment of the United States District Court for the District of Arizona, rendered January 17, 1950, and the order of said District Court denying said plaintiff's motion for new trial entered February 23, 1950, intends to rely upon the following points upon his appeal to the United States Court of Appeals, viz:

1. The judgment rendered is not justified by the evidence and is contrary to law.

2. The District Court failed to make adequate findings of fact upon the issues presented by the pleadings.

3. The findings of fact proposed by the defendant Lawrence Warehouse Company and signed by the District Judge do not warrant the conclusions of law so made and signed and do not support the judgment.

4. There is no evidence to support finding of fact No. I as settled by the District Judge.

5. There is no evidence to support finding of fact No. II as settled by the District Judge.

6. There is no evidence to support finding of fact No. III as settled by the District Judge.

7. There is no evidence to support finding of fact No. IV as settled by the District Judge.

8. There is no evidence to support finding of fact No. V as settled by the District Judge.

9. The District Court's conclusion of law No. I is contrary to the law applicable to the factual situation presented by the evidence.

10. The District Court's conclusion of law No. II is contrary to the law applicable to the factual situation presented by the evidence.

11. The District Court's conclusion of law No. III is contrary to the law applicable to the factual situation presented by the evidence.

12. Based upon the admissions of the parties and the evidence adduced at the trial, the plaintiff is entitled to the following findings of fact, and the District Court erred in refusing to make such findings:

(a) Central Auto Supply Company is a corporation, duly organized and existing under the laws of the State of Arizona. On July 22, 1947, said Central Auto Supply Company was duly adjudicated a bankrupt in and by this court. Thereafter plaintiff Ralph Barry was duly appointed as trustee of said bankrupt and its estate, and he duly qualified as such and is now the duly qualified and acting trustee in bankruptcy of said bankrupt corporation and its estate. He has been duly authorized by the Referee in Bankruptcy, to whom said bankruptcy proceeding was duly referred, to bring and prosecute this action. Defendant Lawrence Warehouse Company is a corporation duly organized and exist-

ing under the laws of the State of California and duly licensed to transact business within the State of Arizona. Defendant The Valley National Bank of Phoenix is a national banking association, duly organized and existing under the laws of the United States of America and having its principal place of business at Phoenix, within the State of Arizona.

(b) At all times here material, to and until its adjudication as a bankrupt as aforesaid, said Central Auto Supply Company was engaged in business as a merchant, and maintained its place of business at 601-603 East Adams Street, in Phoenix, Maricopa County, Arizona. At all such times said Central Auto Supply Company was the owner of a stock of goods, wares and merchandise, which it kept and maintained at its place of business aforesaid, and daily exposed the same to sale in parcels in the regular course of its merchandise business aforesaid.

(c) For the purpose of attempting to create a lien upon or transfer of interest in said entire stock of goods, wares and merchandise, in violation of the provisions of section 62-522 of the Arizona Code of 1939, said Lawrence Warehouse Company did, prior to the adjudication of said Central Auto Supply Company as a bankrupt as aforesaid, issue to said The Valley National Bank of Phoenix certain documents in the form of non-negotiable warehouse receipts, wherein and whereby said Lawrence Warehouse Company recited that said stock of goods, wares and merchandise was held by it in storage

for said The Valley National Bank of Phoenix as attempted security for loans made by said The Valley National Bank of Phoenix to said Central Auto Supply Company.

(d) At all times thereafter, to and until its adjudication in bankruptcy as aforesaid, said Central Auto Supply Company remained in the actual and physical possession of said goods, wares and merchandise, and had the actual control and merchandising and sale thereof and did actually make daily sales therefrom.

(e) The amount owing by Central Auto Supply Company to The Valley National Bank of Phoenix, as of the day of the date of its adjudication in bankruptcy herein, was thirty-one thousand one hundred fifty-five and 84/100 dollars, which was reduced by the sum of one hundred ninety-two and 20/100 dollars by the payment to said bank by the receiver of said Central Auto Supply Company of said sum of one hundred ninety-two and 20/100 dollars leaving a balance owing by said bankrupt corporation to said bank of thirty thousand eight hundred thirty-five and 53/100 dollars.

13. Based upon the admissions of the parties and the evidence adduced at the trial, the District Court should have made and entered the following conclusions of law, and it erred when it refused to do so:

(a) The court has jurisdiction over the parties and of the subject matter, under the provisions of Section 70 of the Bankruptcy Act, 11 U.S.C. Chapter 7, section 110.

(b) The entire scheme of "field warehousing," as disclosed by the record, is contrary to and violative of the provisions of section 62-522 of the Arizona Code of 1939; and the lien or pledge of merchandise contemplated by such scheme is void as to general creditors of the bankrupt.

(c) The plaintiff herein, as trustee in bankruptcy of Central Auto Supply Company, represents in this action the general creditors of the bankrupt.

(d) Section 62-522 of the Arizona Code of 1939 was not repealed or modified, in whole or in part, by implication or otherwise, by the adoption of the uniform warehouse receipt act in Arizona.

(e) The defendants are not, nor is either of them, entitled to the possession of the stock of goods, wares and merchandise, in whole or in part.

(f) The plaintiff is vested with the title to said stock of goods, wares and merchandise, and the whole thereof, and the right of possession thereof, under the provisions of Section 70 of the Act of Congress Relating to Bankruptcy, as amended.

(g) Plaintiff is entitled to judgment, as prayed in his complaint.

/s/ ALLAN K. PERRY,
Attorney for Plaintiff.

[Endorsed]: Filed February 28, 1950.

[Title of District Court and Cause.]

DESIGNATION OF
CONTENTS OF RECORD ON APPEAL

The plaintiff above named hereby designates the following portions of the record to be certified and transmitted to United States Court of Appeals for the Ninth Circuit, to wit:

1. Complaint filed September 19, 1947.
2. Answer to complaint (Lawrence Warehouse Company) filed October 15, 1947.
3. Answer of defendant The Valley National Bank of Phoenix, filed October 15, 1947.
4. Plaintiff's Exhibit No. 1 in evidence (leases) admitted and filed March 17, 1949.
5. Plaintiff's Exhibit No. 2 in evidence (deposition of Harry Stack) admitted and filed March 17, 1949.
6. Plaintiff's Exhibit No. 3 in evidence (deposition of C. D. Cadot) admitted and filed March 17, 1949.
7. Plaintiff's Exhibit No. 4 in evidence (deposition of Paul S. Godber) admitted and filed March 17, 1949.
8. Plaintiff's Exhibit 5 in evidence (deposition of J. C. Baldwin) admitted and filed March 17, 1949.
9. Plaintiff's Exhibit No. 6 in evidence (deposition of E. R. Tolfree) admitted and filed March 17, 1949.
10. Plaintiff's Exhibit No. 7 in evidence (depo-

sition of F. A. Warburton) admitted and filed March 17, 1949.

11. Plaintiff's Exhibit No. 8 in evidence (deposition of M. Blackburn) admitted and filed March 17, 1949.

12. Plaintiff's Exhibit No. 9 in evidence (deposition of David Shapiro) admitted and filed March 17, 1949.

13. Plaintiff's Exhibit No. 10 in evidence (deposition of F. C. Westphal) admitted and filed March 17, 1949.

14. Defendant Lawrence Warehouse Company's Exhibit A in evidence (group of photographs) admitted and filed March 17, 1949.

15. Defendant Lawrence Warehouse Company's Exhibit E in evidence (warehouse receipts) admitted and filed March 17, 1949.

16. Defendant Lawrence Warehouse Company's Exhibit F in evidence (confirmation of delivery sheet) admitted and filed March 17, 1949.

17. All minute orders entered on or after March 17, 1949.

18. Defendant's proposed findings of fact, conclusions of law and judgment filed December 13, 1949, signed by trial judge, and refiled January 17, 1950.

19. Plaintiff's objections to findings of fact and conclusions of law proposed by defendants, filed December 16, 1949.

20. Plaintiff's motion for new trial, filed January 19, 1950.

21. Reporter's transcript filed February 24, 1950.
22. Plaintiff's notice of appeal, filed February 27, 1950.
23. Statement of points upon which plaintiff intends to rely upon his appeal filed February 28, 1950.
24. This designation.

/s/ ALLAN K. PERRY,
Attorney for Plaintiff.

[Endorsed]: Filed February 28, 1950.

In the United States District Court
for the District of Arizona

No. Civ. 1102 Phx.

RALPH BARRY as Trustee in Bankruptcy of
Central Auto Supply Company, a Corporation,
Bankrupt,
Plaintiff,

vs.

LAWRENCE WAREHOUSE COMPANY, a Corporation, and THE VALLEY NATIONAL BANK OF PHOENIX, a National Banking Association,

Defendants.

REPORTER'S TRANSCRIPT

The above-entitled and numbered cause came on duly and regularly for hearing before the Honorable Dave W. Ling, Judge, presiding in the above-

entitled court at Phoenix, Arizona, without a jury, commencing at the hour of 10:00 o'clock, a.m., on the 17th day of March, 1949.

The plaintiff was represented by Mr. Allan K. Perry, of Messrs. Kramer, Morrison, Roche & Perry.

The defendant, Lawrence Warehouse Company, a corporation, was represented by Mr. Walter E. Craig, of Messrs. Fennemore, Craig, Allen & Bledsoe, Phoenix, Arizona, and William R. Ray, of Messrs. Williamson & Wallace, attorneys at law at San Francisco, California.

The defendant, Valley National Bank of Phoenix, was represented by John L. Gust, of Messrs. Gust, Rosenfeld, Divelbess, Robinette & Linton.

The following proceedings were had:

The Clerk: Civil 1102, Phoenix, Ralph Barry, as Trustee in Bankruptcy of Central Auto Supply Company, a corporation, bankrupt, plaintiff, versus Lawrence Warehouse Company, a corporation, and the Valley National Bank of Phoenix, a national banking association, defendants, for trial.

Mr. Perry: The plaintiff is ready, your Honor.

Mr. Craig: The defendants are ready. If the Court please, at this time I'd like to make an admission for the purpose of trying this case, Mr. William R. Ray, of Williamson & Wallace, San Francisco, a member of the California Bar, and he has been duly admitted to practice in the Ninth Circuit Court of Appeals, and in the District Courts of California.

The Court: All right, you may enter the order. You may proceed.

Mr. Perry: Mr. Kersting. [2*]

ROBERT E. KERSTING

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Perry:

Q. Will you state your name, please?

A. Robert E. Kersting.

Q. Where do you live?

A. At 1614 West Thomas Road, Phoenix.

Q. Are you the President of the Central Auto Supply Company, a corporation?

A. I was for a period of time immediately prior to its bankruptcy, yes.

Q. Well, the corporation is still in existence, isn't it?

A. De facto or de jure.

Q. At any event, you were President of the corporation for what period of time prior to its adjudication as a bankrupt?

A. I would say approximately seven months.

Q. And before that had you had any connection with the Central Auto Supply Company?

A. I was technically a partner, I guess, in the prior partnership before the corporation was formed.

Q. Will you just give the Court a brief history of that? Originally it was a corporation by a part-

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of Robert E. Kersting.)

nership consisting of J. S. Holmes and W. L. Hargrave? Is that correct?

A. That is correct.

Q. Under what name did you gentlemen do business?

A. At the time I became associated with the Company it was called the Arizona Piston Service, and maintained a small machine shop and auto parts supply house at 501 South Central. Shortly after that they adopted another name, the Central Auto Supply, at some time, and shortly thereafter incorporated and moved to a new building at 601 East Adams.

Q. Do you recall about when that was when you incorporated?

A. I believe it was the first part of '45, but I could not say exactly.

Q. And right at that time or shortly thereafter you moved to this new location?

A. Close to that period, yes.

Q. And did you maintain then the place of business at 601 to 609 East Adams Street up until the time of the adjudication in bankruptcy?

A. That is correct.

Mr. Perry: Counsel have agreed, if your Honor [4] please, that there might be introduced in evidence as Plaintiff's Exhibit, as one exhibit, a group of warehouse leases, pledge and warehousing agreement, and a plat showing the space leased by the Central Auto Supply Company to the Law-

(Testimony of Robert E. Kersting.)

rence Warehouse Company, field warehouse storage agreement, and earlier documents between the partnership and the Lawrence Warehouse Company, they might go in as one exhibit.

The Court: Very well.

Mr. Perry: That is correct?

Mr. Craig: That is correct, and I would also like, as a part of the stipulation, if it is agreeable to the Court, that the originals may be removed upon substitution of photostatic copies.

The Court: All right. They may be received.

(Thereupon the documents were received and marked as Plaintiff's Exhibit No. 1 in evidence.)

PLAINTIFF'S EXHIBIT No. 1

Lawrence Warehouse Company Field Warehouse Lease

This Indenture, made in the City of Phoenix, County of Maricopa, and State of Arizona, this 17th day of March, 1947, by and between Central Auto Supply, Inc., a corporation, hereinafter called the lessor, and Lawrence Warehouse Company, a California corporation, hereinafter called the lessee;

Witnesseth:

Whereas, the lessor is the owner of the real estate, together with all improvements thereon, situate in

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

the City of Phoenix, County of Maricopa, and state of Arizona, described as follows; viz. 601 East Adams St., Phoenix, Arizona.

Now, Therefore, the lessor hereby rents, demises and leases, and the lessee hereby hires and takes of and from the lessor that part of the aforesaid premises described as follows, viz:

That certain storage space located in the one story brick building situated at the above address, said storage space being more particularly described as follows: fifty-four (54') feet in its greatest north and south dimension and fifty (50') feet in its greatest east and west dimension—all as shown outlined in red on plat marked Exhibit A attached hereto and made a part hereof.

with the appurtenances, together with the full right of ingress and egress to and from said premises, over and through any other premises of the lessor, to be occupied for the conduct of a field warehouse on a tenancy from month to month, and until said tenancy shall be terminated by a thirty (30) day written notice given by either party to the other, for the aggregate rental of One Dollar (\$1.00), the receipt of which is hereby acknowledged; provided, that no notice of termination by lessor shall become effective unless all warehouse receipts, or other evidence of the storage, representing commodities stored in or on said premises, or any part thereof, issued by lessee shall have been surrendered to

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

lessee and cancelled, and all charges of lessee due or to become due in connection with the operation of such warehouse shall have been fully paid.

The lessor covenants and agrees that the lessee may place on, in or adjacent to said leased premises, such signs and other evidences as it may deem necessary to indicate its possession of the leased premises and of the commodities stored therein or thereon, and further that the lessee shall have the paramount right at all times during the term of this lease to use any facilities of the lessor for receiving, handling, weighing, storing, caring for, packing, shipping and delivering any stored commodities.

It is expressly understood and agreed that the lessor shall not have access to the leased premises or to the commodities stored therein or thereon, provided, that, with the consent of the lessee, the lessor may enter the warehouse conducted on said premises and, under the supervision of the lessee, deliver thereto commodities for storage, perform such acts as are necessary in the care and preservation of the same while stored and accept delivery of commodities which are designated and released from storage by the lessee, and for the further purpose of making repairs as hereinafter provided.

The lessor agrees with the lessee that it will at its own cost and expense keep said demised premises in good order and repair, and that the lessee shall not be called upon or required to make any repairs

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

of any kind or nature to, in or about said demised premises; and said lessor hereby covenants and agrees to indemnify lessee against any claim, expense, loss or damage suffered by lessee as a result of its occupancy of the premises and against any loss or damage to commodities which may be stored in said premises by the said lessee; and said lessor holds said lessee harmless from any damage or loss that may come to any commodities stored in said premises, irrespective of the nature or cause of said damage or loss.

Charter reads Central Auto Supply, Inc., however, the seal reads Central Auto Supply.

Should the lessor violate any of the terms or conditions of this lease, or in any manner interfere with, or make difficult the duties of the agents, servants, or employees of the lessee; or become insolvent, or should the premises hereby leased become involved in any manner in litigation, or should the lessor or the lessee be ejected or ousted therefrom, or proceedings be begun for that purpose; or should the lessee at any time deem it necessary for the protection of its interests or of the commodities stored, then the lessee shall have the right to remove all commodities from the premises herein described to such other place or places as the lessee may deem proper or expedient; and in case of any such removal the lessor undertakes and agrees to pay the lessee all expenses of such removal and of

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

storing said commodities elsewhere in addition to any other proper charges against said commodities.

The lessor warrants and guarantees the peaceful possession of the premises by the lessee and agrees to indemnify and hold the lessee harmless of and from any and all claims and expenses incurred or assumed by lessee in defending or maintaining possession of said premises. The lessor agrees to execute or cause to be executed any further agreement or agreements that may be necessary to secure the convenient use and enjoyment of the premises hereby leased by the lessee.

Said lessor further agrees with said lessee to pay for all gas, electricity, light, heat, power, steam, water or other utility supplied to or used upon said demised premises during the term of this tenancy.

The lessee, without the consent of the lessor, shall not for all or any part of the term herein granted, sublet the said premises nor assign this lease.

In Witness Whereof, lessor has caused this lease to be executed by its proper corporate officers and its corporate seal to be hereunto affixed, and lessee has caused this lease to be executed by its proper corporate officers and its corporate seal to be hereunto affixed the day and year first above written.

CENTRAL AUTO SUPPLY,
INC.,

Lessor.

[Seal] By /s/ ROBERT E. KERSTING,
President.

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

Attest:

C. W. SAXON,
Treas.

LAWRENCE WAREHOUSE
COMPANY,
Lessee.

[Seal] /s/ E. C. YUILLE,
Vice-President.

Attest:

/s/ F. C. HEDGER,
Assistant Secretary.

Assent—Use If Lessor Is Not Owner of
Within Described Premises

Now comes Owner of the property in the fore-
going lease, and hereby consents to the making of
said lease.

.....

(Corporation Form)

State of Arizona

County of Maricopa—ss.

I, Ronald Webster, Jr., a Notary Public in and
for said County and State, do hereby Certify that
Robert E. Kersting, personally known to me to be
the President of Central Auto Supply, Inc., and
C. W. Saxon personally known to me to be the
Treasurer of said corporation, whose names are
subscribed to the foregoing instrument, appeared

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

before me this day in person, and severally acknowledged that as such President and Treasurer they signed and delivered the said instrument as such President and Treasurer of said corporation, and caused the corporate seal of said corporation to be affixed hereto, pursuant to authority given by the Board of Directors of said corporation, as their free and voluntary act and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

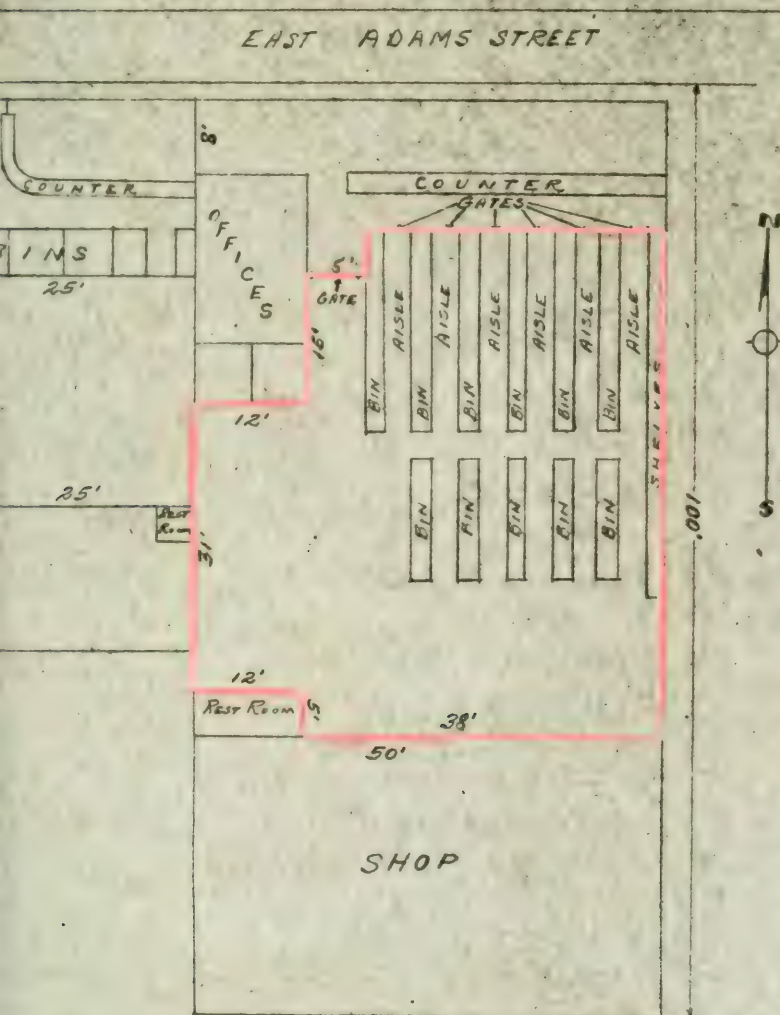
Given Under My Hand and Notarial Seal this
18th day of March, A.D. 1947.

[Seal] /s/ RONALD WEBSTER, JR.,
Notary Public.

My Commission Expires January 7, 1951.

EXHIBIT "A"
 LAWRENCE WAREHOUSE COMPANY
 PHOENIX, ARIZONA WAREHOUSE NO. 21

THE SPACE AS SHOWN OUTLINED IN RED ON THIS DIAGRAM IS
 TO LAWRENCE WAREHOUSE COMPANY, WAREHOUSEMAN, AND IS BEING
 TED AS PHOENIX, ARIZONA WAREHOUSE NO. 21.



(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

Lease

Modification of Pledge and
Warehousing Agreement

This Agreement, made at Los Angeles, California, this 17th day of March, 1947, by and between Central Auto Supply, Inc., a corporation organized and existing under the laws of the State of Arizona, having its principal place of business in the City of Phoenix, County of Maricopa and State of Arizona, hereinafter called the "Company"; Lawrence Warehouse Company, a corporation organized and existing under and by virtue of the laws of the State of California, hereinafter called the "Warehouseman"; and the Valley National Bank, having its principal place of business in the City of Phoenix, Arizona, hereinafter called the "Bank."

Witnesseth:

Whereas, the parties hereto entered into a certain Pledge and Warehousing Agreement dated the 17th day of March, 1947; and

Whereas, it has become necessary to change the space comprising said warehouse;

Now, Therefore, in consideration of the premises, the parties hereto covenant and agree as follows:

1. Said Pledge and Warehousing Agreement is hereby modified so that the warehouse described in

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

Exhibit "A" attached thereto shall consist of the space more particularly described in Exhibit "B" attached hereto and made a part hereof.

2. Except as herein modified the said Pledge and Warehousing Agreement is in all respects continued in full force and effect.

In Witness Whereof, the parties hereto have caused this agreement to be executed in quadruplicate by their proper corporate officers and their corporate seals to be hereunto affixed, the day and year first above written.

CENTRAL AUTO SUPPLY,
INC.

[Seal] By /s/ O. R. KERSTING.

Attest:

/s/ C. W. SAXON.

LAWRENCE WAREHOUSE
COMPANY,

[Seal] By /s/ E. C. YUILLE,
Vice President.

Attest:

/s/ F. C. HEDGER,
Asst. Secy.

VALLEY NATIONAL BANK,

[Seal] By /s/ W. MONTGOMERY,
Vice President.

Attest:

/s/ A. K. WILDMAN.

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

Exhibit B

That certain storage space located in the one story brick building situated at 601 East Adams Street, Phoenix, Arizona, said storage space being more particularly described as follows: fifty-four (54') feet in its greatest north and south dimension and fifty (50') feet in its greatest east and west dimension—all as shown outlined in red on plat marked Exhibit B attached hereto and made a part hereof.

Lawrence Warehouse Company
Pledge and Warehousing Agreement

This Agreement, made in Phoenix, Arizona, this 17th day of March, 1947, by and between Central Auto Supply, Inc., a corporation organized and existing under the laws of the State of Arizona, having its principal place of business in the City of Phoenix, County of Maricopa, and State of Arizona, hereinafter called the "Company"; Lawrence Warehouse Company, a corporation organized and existing under and by virtue of the laws of the State of California, hereinafter called the "Warehouseman"; and Valley National Bank of Phoenix having its principal place of business in the City of Phoenix, Arizona, hereinafter called the "Bank."

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

Witnesseth:

Whereas, the Company is engaged in the auto parts business and is desirous of obtaining credit for the conduct of its business; and

Whereas, the Warehouseman is engaged in a general warehouse business; and

Whereas, the Bank is engaged in a general banking business and is desirous of extending credit to the Company, upon such terms and conditions, and for such time, and in such amounts, as may be required by the Company and approved by the Bank;

Now, Therefore, the parties hereto covenant and agree as follows:

1. The Company agrees to deliver to the Warehouseman to be held by it, for the account of the Bank, such delivery to be effective from and after the commencement of inventory taking as herein-after provided, all commodities listed on such inventory and located in Warehouseman's Phoenix, Arizona, Warehouse No. 21, as more particularly described in Exhibit "A" attached hereto and made a part hereof, which warehouse is, or is about to be, leased by the Warehouseman from the Company, and the Company agrees that all said commodities in said warehouse and all commodities which may thereafter be delivered into said ware-

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

house by the Company or its agents during the term of this agreement, will be delivered to the Warehouseman for the account of the Bank; and further agrees that such delivery of commodities shall constitute evidence conclusive against the Company of the delivery of said commodities to the Warehouseman for the account of the Bank, and all parties to this contract agree that such commodities immediately upon delivery into said warehouse are pledged to the Bank and become a part of the Bank's security.

2. The Company does hereby certify and guarantee that it has not delivered and will not deliver to the Warehouseman any commodities of which it was not or is not the legal owner at the time of such delivery. The Warehouseman is hereby requested and authorized to issue in the name of the Bank from time to time, a non-negotiable warehouse receipt, or receipts, for the commodities delivered to it; and the Company agrees to execute such documents as may be required in the issuance of such non-negotiable warehouse receipts.

3. The Warehouseman will accept delivery of said commodities under the following terms and conditions:

(a) The Warehouseman agrees that during the period of this agreement it will retain actual and exclusive possession of all said commodities, and will

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

not permit or suffer the Company, or any of its agents, to have possession, either actual or constructive thereof, it being understood and agreed, however, that with the consent of the Warehouseman, the Company and its employees may enter the warehouse space, and under the supervision of employees of the Warehouseman, deliver thereto commodities for storage, perform such acts as are necessary in the care and preservation of the same while stored, and accept delivery of commodities which are designated and released from storage by the Warehouseman.

(b) Delivery by the Warehouseman of any of the said commodities as hereinafter provided shall constitute a complete discharge of any liability on the part of the Warehouseman to the Company and the Bank as to such commodities delivered.

(c) The Company agrees to hold the Warehouseman harmless from any claims, demands, suits of any nature whatsoever which may be made or brought by reason of this agreement and any acts thereunder, excepting such claims as may be made by the Company against the Warehouseman by reason of its failure to exercise that degree of care in the safekeeping of said commodities which a reasonably careful man would exercise in regard to similar commodities of his own.

(d) The Company agrees to pay the Warehouseman as compensation for services hereunder the

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

fees and other charges as set forth and in the manner provided in that certain Field Warehouse Storage Agreement between Lawrence Warehouse Company and Central Auto Supply, Inc., dated July 26, 1946.

(e) It is understood and agreed between the parties hereto that the Warehouseman shall in no event be obligated to deliver any of the commodities covered by this agreement, until the Warehouseman shall have been paid in full outstanding and unpaid fees and other charges at the time of such delivery. It is further understood and agreed that any unpaid fees and other charges shall constitute a warehouseman's lien against any or all of the commodities at any time deposited and remaining in the warehouse.

(f) The Warehouseman shall be bound only by its own inventories, warehouse receipts and records.

(g) The Warehouseman agrees that it will issue a non-negotiable warehouse receipt, or receipts, to the Bank covering the commodities described on the original inventory to be prepared as hereinafter provided and will thereafter at least once each week, issue further non-negotiable warehouse receipts to the Bank covering commodities which have been delivered into said warehouse during the preceding week and not covered by a previously issued warehouse receipt.

4. The Company agrees that it will maintain dur-

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

ing the term of this agreement such insurance, if any, as is required by the Bank, and will cause all policies to contain a clause making the loss, if any, payable to the Warehouseman and to the Bank as interest may appear, and the Bank and the Warehouseman need not carry such insurance.

5. The Warehouseman agrees that it will, with all convenient and reasonable dispatch, take and prepare, in triplicate, a complete inventory of the commodities delivered to it, using thereon the description furnished to it by the Company of said commodities. The Warehouseman agrees to issue to the Bank its Non-Negotiable Warehouse Receipts for all of said commodities as shown on said inventory.

The Warehouseman agrees to keep a complete record of additional commodities delivered by the Company into the warehouse for the account of the Bank, using thereon the description furnished to it by the Company of said commodities, and at least once each week to issue to the Bank its Non-Negotiable Warehouse Receipt for all of said commodities so delivered to it. Each such Non-Negotiable Warehouse Receipt shall bear the following legend:

This Warehouse Receipt is issued to cover commodities received at the warehouse between and, both inclusive, and is subject to deliveries made from the warehouse by the Warehouseman during the same period under instructions from

(Testimony of Robert E. Kersting.) •

Plaintiff's Exhibit No. 1—(Continued)

the Warehouse Receipt holder. Documents covering commodities received and delivery orders covering commodities delivered are on file at the warehouse.

The Warehouseman agrees that it will from time to time, upon request of the Bank, take a complete inventory of all commodities in storage in said warehouse and will thereupon issue to the Bank a new Non-Negotiable Warehouse Receipt or Receipts showing the commodities on hand in lieu of all outstanding Warehouse Receipts and upon delivery thereof to and acceptance by the Bank, the Bank agrees to surrender simultaneously to the Warehouseman all then outstanding Warehouse Receipts.

The Company agrees, that on such form and in such manner as is requested by the Warehouseman, it will certify and guarantee its legal ownership of all of the commodities deposited with the Warehouseman, that the quality and quantity stated on such forms are correct and that said commodities are delivered to the Warehouseman for warehousing purposes in accordance with the terms of written agreements executed by the Company. The Warehouseman shall not be liable for any errors or inaccuracies in any description furnished by the Company.

6. The Warehouseman agrees to deliver any commodities in its possession, represented by non-negotiable warehouse receipts or held pursuant to this

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

agreement, in accordance with any Delivery Instructions in writing, or Order for Warehouse Release delivered to the Warehouseman by the Bank. It is mutually agreed that any Delivery Instructions in writing or Order for Warehouse Release received by the Warehouseman shall not give the Company any right, title or interest in or to any of the commodities stored pursuant to this agreement until the actual delivery thereof by the Warehouseman to the Company.

7. It is mutually agreed that nothing herein contained shall in any manner whatsoever be construed as a commitment on the part of the Bank to extend any credit or to make any loan or loans to the Company, the Bank expressly reserving unto itself the right to extend such credit or make such loans to the Company as in its absolute discretion it may deem advisable and to terminate such credit, as to any future loans, at any time at its option and in its sole discretion, and to proceed to the collection of any indebtedness in accordance with any collateral agreement or collateral note made by the Company to the Bank.

8. It is mutually agreed that all commodities of like description stored pursuant to this agreement may each be warehoused as one general lot of fungible goods, and that the holder of a warehouse receipt shall be entitled to such portion of each such general lot as the amount of each commodity rep-

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

resented by such receipt bears to the whole of such general lot of such commodity.

9. This agreement shall remain in full force and effect until such time as the Bank shall notify the Warehouseman, in writing, that its obligations as a warehouseman have been completely fulfilled and discharged, provided, however, that the Warehouseman shall have the right to terminate and cancel this agreement at any time upon giving thirty (30) days' written notice to the company and the Bank if the Company is in arrears in payment of charges or fees or is interfering with the operation of the warehouse above referred to. The termination or cancellation of this agreement shall not terminate or cancel said Field Warehouse Storage Agreement hereinbefore referred to, nor the liability of the Warehouseman on any Warehouse Receipts outstanding.

10. It is mutually agreed that this agreement shall be construed in accordance with the Uniform Warehouse Receipts Act of the State in which said warehouse is situate, and from and after delivery into the said warehouse, all commodities shall be governed by and be subject to the provisions of said Act.

In Witness Whereof, the parties hereto have caused this agreement to be executed in quadruplicate by their proper corporate officers and their

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)
corporate seals to be hereunto affixed, the day and
year first above written.

CENTRAL AUTO SUPPLY,
INC.,

[Seal] By/s/ ROBERT E. KERSTING,
President.

Attest:

/s/ W. L. Hargrove,
Secretary.

LAWRENCE WAREHOUSE
COMPANY,

[Seal] By /s/ E. C. YUILLE,
Vice-President.

Attest:

/s/ F. C. HEDGER,
Assistant Secretary.

VALLEY NATIONAL BANK
OF PHOENIX,

By /s/ [Indistinguishable.]
President.

Attest:

/s/ A. K. WILDMAN,
Asst. Cashier.

Exhibit "A"

Those certain storage spaces located in that certain brick and concrete building located at 601-609 E. Adams St., Phoenix, Maricopa County, Arizona;

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

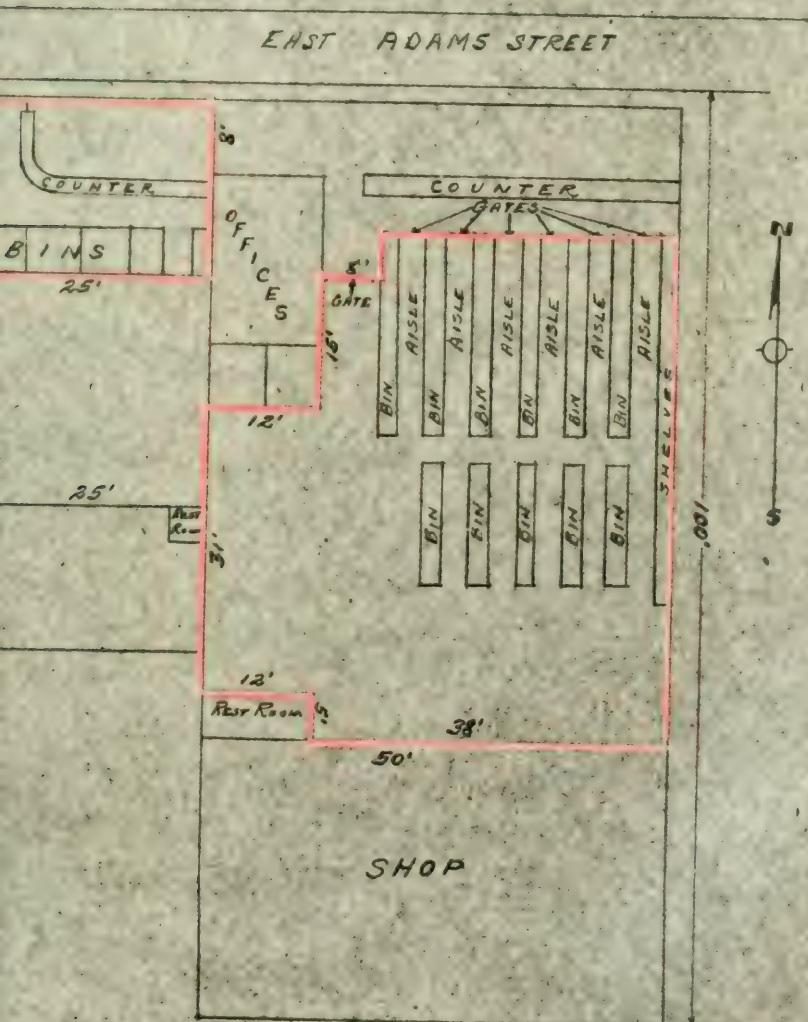
said spaces being more particularly described as follows:

That certain storage space located in the main portion of said building said space being fifty-six (56') feet in its greatest north and south dimension and fifty (50') feet in its greatest east and west dimension, and also

That certain storage space located adjacent to and immediately west of the above-described area—this space being twenty-five (25') feet by nineteen (19') feet.

EXHIBIT "A"
 LAWRENCE WAREHOUSE COMPANY
 PHOENIX, ARIZONA WAREHOUSE NO. 21

OF THE SPACE AS SHOWN OUTLINED IN RED ON THIS DIAGRAM IS
 ED TO LAWRENCE WAREHOUSE COMPANY, WAREHOUSEMAN, AND IS BEING
 ATED AS PHOENIX, ARIZONA WAREHOUSE NO. 21.



(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

Lawrence Warehouse Company

Field Warehouse Storage Agreement

This Agreement, made and entered into at Phoenix, Arizona, this 23rd day of May, 1947, by and between Lawrence Warehouse Company, a California corporation, party of the first part, hereinafter called "Lawrence" and Central Auto Supply, Inc., a corporation, party of the second part, hereinafter called "The Depositor," in consideration of the mutual covenants and agreements hereinafter contained,

Witnesseth:

1. The depositor hereby employs Lawrence to establish and operate all field warehouses required in the depositor's business upon the following terms and conditions:

2. The depositor agrees to lease, or cause to be leased, to Lawrence, upon its form of Field Warehouse Lease, adequate warehouse storage space for all commodities to be warehoused so located and constructed as to secure the proper storing and safety of commodities to be warehoused.

3. The depositor agrees to pay to Lawrence for conducting such field warehouse or warehouses, and for storing commodities therein, the following:

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

Storage Charges:

Auto Parts and Supplies:

One-tenth of one per cent ($1/10$ of 1%) of value of commodities stored per calendar month or fraction thereof. The second party agrees to report to the first party the values of commodities for which warehouse receipts are issued.

Location Charge—Per Location:

\$250.00 per year to cover the cost of Fidelity bonds on warehouse employees, regular examinations, supplies, etc., payable upon the issuance of the first warehouse receipt or other evidence of deposit and annually thereafter.

Contract year as used herein shall be understood to run from July 26th and annual thereafter on the same day of each succeeding year during the term of this Agreement.

Premiums for insurance on commodities represented by outstanding insured warehouse receipts as provided in the "Insurance Agreement" signed by the depositor and Lawrence.

The storage charges above set forth are subject to an annual minimum payment of Two Hundred Fifty Dollars (\$250.00) payable on the date of this agreement and annually thereafter on the same day of each succeeding year during the term of this agreement. Storage charges accruing in excess of minimum payable on or before ten (10) days after date of invoice.

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

The actual cost incurred by Lawrence for all employees required by Lawrence in the conduct of said warehouse or warehouses, and in the storing and handling of commodities therein, plus ten per cent (10%), payable on or before ten (10) days after date of invoice, such ten per cent (10%) to be deducted if all invoices are paid when due.

All license fees, taxes or charges levied or imposed by Federal, State, County or Municipal Governments or governmental agencies upon the operation of said warehouses, payable upon presentation of invoice.

\$100.00 for installation, preparation of documents, etc., non-recurring, payable in advance.

Regular warehouse examinations, \$. . . . annually, payable in advance.

Special examinations at cost, payable upon presentation of invoice.

All expenses including attorneys' fees incurred by Lawrence incident to conducting any warehouse under this agreement, maintaining possession of the warehouse commodities for the benefit of warehouse receipt holders and the depositor, and in connection with any litigation in which Lawrence or the depositor is a party, payable upon presentation of invoice.

4. Lawrence hereby accepts the employment on the terms hereinbefore set forth, and agrees to ex-

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

tend to the depositor the full benefit of its facilities and experience as a field warehouseman.

5. It is mutually agreed that in the event no warehouse receipts are outstanding at the beginning of or issued during any contract year, and field warehouse storage is not required during such contract year, the obligation of the depositor to pay the minimum storage charges hereinbefore provided for, shall be suspended, and thereafter the term of this agreement shall be extended one year for each year of such suspension. Contract year as used herein shall mean the twelve (12) successive months immediately following the date of this agreement, and each successive twelve (12) month period.

6. It is mutually agreed that all commodities of like description stored pursuant to this agreement may each be warehoused as one general lot of fungible goods, and that the holder of a warehouse receipt shall be entitled to such portion of each such general lot as the amount of each commodity represented by such receipt bears to the whole of such general lot of such commodity.

7. This agreement shall continue in full force and effect for three (3) years from the date hereof, and thereafter for successive three (3) year terms unless either party gives to the other written notice of intention to terminate at least ninety (90) days

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

prior to the expiration of the then current three (3) year term, provided, that no such notice of intention to terminate given by the depositor shall become effective unless all warehouse receipts, or other evidence of the storage of commodities, issued by Lawrence shall have been surrendered to Lawrence and cancelled and all charges of Lawrence shall have been paid prior to the expiration of said term, and provided further, that Lawrence shall have the right to cancel this agreement at any time upon giving thirty (30) days written notice to the depositor if the depositor is in arrears in payment of charges or is interfering with the operation of any warehouse established pursuant to this agreement.

In Witness Whereof, Lawrence has caused this agreement to be executed by its proper corporate officers and its corporate seal to be hereunto affixed, and the depositor has caused this agreement to be executed by its proper corporate officers and its corporate seal to be hereunto affixed, the day and year first above written.

LAWRENCE WAREHOUSE
COMPANY,

[Seal] By /s/ E. C. YUILLE,
Vice-President.

Attest:

/s/ C. HILDRETH,
Secretary.

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

CENTRAL AUTO SUPPLY,
INC.,

[Seal] By /s/ ROBERT E. KERSTING,
President.

Attest:

/s/ W. L. HARGROVE,
Secretary.

Lawrence Warehouse Company

Field Warehouse Storage Agreement

This agreement, made and entered into at Phoenix, Arizona, this 26th day of July, 1946, by and between Lawrence Warehouse Company, a California corporation, party of the first part, hereinafter called "Lawrence" and J. S. Holmes, R. E. Kersting, W. L. Hargrove d/b/a Central Auto Supply, a partnership, party of the second part, hereinafter called "The Depositor," in consideration of the mutual covenants and agreements hereinafter contained,

Witnesseth:

1. The depositor hereby employs Lawrence to establish and operate all field warehouses required in the depositor's business upon the following terms and conditions:

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

2. The depositor agrees to lease, or cause to be leased, to Lawrence, upon its form of Field Warehouse Lease, adequate warehouse storage space for all commodities to be warehoused so located and constructed as to secure the proper storing and safety of commodities to be warehoused.

3. The depositor agrees to pay to Lawrence for conducting such field warehouse or warehouses, and for storing commodities therein, the following:

Storage Charges:

Auto Parts and Supplies:

One-tenth of one percent ($1/10$ of 1%) of value of commodities stored per calendar month or fraction thereof. The second party agrees to report to the first party the values of commodities for which warehouse receipts are issued.

Location Charge—per location:

\$250.00 per year to cover the cost of Fidelity bonds on warehouse employees, regular examinations, supplies, etc., payable upon the issuance of the first warehouse receipt or other evidence of deposit and annually thereafter.

Location charge, minimum and installation charge all due and payable at the time of issuance of the issuance of the first warehouse receipt.

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

[In longhand]: Cancelled by contract dated 5/23/47.

The storage charges above set forth are subject to an annual minimum payment of Two Hundred Fifty (\$250.00) Dollars payable on the date of this agreement and annually thereafter on the same day of each succeeding year during the term of this agreement. Storage charges accruing in excess of minimum payable on or before ten (10) days after date of invoice.

The actual cost incurred by Lawrence for all employees required by Lawrence in the conduct of said warehouse or warehouses, and in the storing and handling of commodities therein, plus ten percent (10%), payable on or before ten (10) days after date of invoice, such ten percent (10%) to be deducted if all invoices are paid when due.

All license fees, taxes or charges levied or imposed by Federal, State, County or Municipal Governments or governmental agencies upon the operation of said warehouses, payable upon presentation of invoice.

\$100.00 for installation, preparation of documents, etc., non-recurring, payable in advance.

Regular warehouse examinations, annually, payable in advance.

Special examinations at cost, payable upon presentation of invoice.

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

All expenses including attorneys' fees incurred by Lawrence incident to conducting any warehouse under this agreement, maintaining possession of the warehoused commodities for the benefit of warehouse receipt holders and the depositor, and in connection with any litigation in which Lawrence or the depositor is a party, payable upon presentation of invoice.

4. Lawrence hereby accepts the employment on the terms hereinbefore set forth, and agrees to extend to the depositor the full benefit of its facilities and experience as a field warehouseman.

5. It is mutually agreed that in the event no warehouse receipts are outstanding at the beginning of or issued during any contract year, and field warehouse storage is not required during such contract year, the obligation of the depositor to pay the minimum storage charges hereinbefore provided for, shall be suspended, and thereafter the term of this agreement shall be extended one year for each year of such suspension. Contract year as used herein shall mean the twelve (12) successive months immediately following the date of this agreement, and each successive twelve (12) month period.

6. It is mutually agreed that all commodities of like description stored pursuant to this agreement, may each be warehoused as one general lot of fungible goods, and that the holder of a warehouse

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

receipt shall be entitled to such portion of each such general lot as the amount of each commodity represented by such receipt bears to the whole of such general lot of such commodity.

7. This agreement shall continue in full force and effect for three (3) years from the date hereof, and thereafter for successive three (3) year terms unless either party gives to the other written notice of intention to terminate at least ninety (90) days prior to the expiration of the then current three (3) year term, provided, that no such notice of intention to terminate given by the depositor shall become effective unless all warehouse receipts, or other evidence of the storage of commodities, issued by Lawrence shall have been surrendered to Lawrence and cancelled and all charges of Lawrence shall have been paid prior to the expiration of said term, and provided further, that Lawrence shall have the right to cancel this agreement at any time upon giving thirty (30) days written notice to the depositor if the depositor is in arrears in payment of charges or is interfering with the operation of any warehouse established pursuant to this agreement.

In Witness Whereof, Lawrence has caused this agreement to be executed by its proper corporate officers and its corporate seal to be hereunto affixed, and the depositor has caused this instrument to be

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)
executed by a partner thereunto duly authorized, the
day and year first above written.

LAWRENCE WAREHOUSE
COMPANY,

[Seal] By /s/ E. C. YUILLE,
Vice-President.

Attest:

/s/ C. HILDRETH,
Secretary.

J. S. HOLMES,
R. E. KERSTING and
W. L. HARGROVE,

Doing Business Under the
Trade Name and Style of

CENTRAL AUTO SUPPLY,

By /s/ ROBERT E. KERSTING,
Partner.

Attest:

By /s/ W. L. HARGROVE,
Partner.

By /s/ J. S. HOLMES,
Partner.

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

Lawrence Warehouse Company
Pledge and Warehousing Agreement

[In longhand]: Cancelled by P/W/A dated 3/17/47.

This Agreement, made in Phoenix, Arizona, this 30 day of July, 1946, by and between J. S. Holmes, R. E. Kersting and W. L. Hargrove, a partnership, d/b/a Central Auto Supply organized and existing under the laws of the State of Arizona, having its principal place of business in the City of Phoenix, County of Maricopa, and State of Arizona, hereinafter called the "Company"; Lawrence Warehouse Company, a corporation organized and existing under and by virtue of the laws of the State of California, hereinafter called the "Warehouseman"; and Valley National Bank, having its principal place of business in the City of Phoenix, Arizona, hereinafter called the "Bank."

Witnesseth:

Whereas, the Company is engaged in the auto parts and supply business and is desirous of obtaining credit for the conduct of its business; and

Whereas, the Warehouseman is engaged in a general warehouse business; and

Whereas, the Bank is engaged in a general banking business and is desirous of extending credit to

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

the Company, upon such terms and conditions, and for such time, and in such amounts, as may be required by the Company and approved by the Bank;

Now, Therefore, the parties hereto covenant and agree as follows:

1. The Company agrees to deliver to the Warehouseman to be held by it, for the account of the Bank, such delivery to be effective from and after the commencement of inventory taking as hereinafter provided, all commodities listed on such inventory and located in Warehouseman's Phoenix, Arizona, Warehouse No. 21, as more particularly described in Exhibit "A" attached hereto and made a part hereof, which warehouse is, or is about to be, leased by the Warehouseman from the Company, and the Company agrees that all said commodities in said warehouse and all commodities which may thereafter be delivered into said warehouse by the Company or its agents during the term of this agreement, will be delivered to the Warehouseman for the account of the Bank; and further agrees that such delivery of commodities shall constitute evidence conclusive against the Company of the delivery of said commodities to the Warehouseman for the account of the Bank, and all parties to this contract agree that such commodities immediately upon delivery into said warehouse are pledged to the Bank and become a part of the Bank's security.

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

2. The Company does hereby certify and guarantee that it has not delivered and will not deliver to the Warehouseman any commodities of which it was not or is not the legal owner at the time of such delivery. The Warehouseman is hereby requested and authorized to issue in the name of the Bank from time to time, a non-negotiable warehouse receipt, or receipts, for the commodities delivered to it; and the Company agrees to execute such documents as may be required in the issuance of such non-negotiable warehouse receipts.

3. The Warehouseman will accept delivery of said commodities under the following terms and conditions:

(a) The Warehouseman agrees that during the period of this agreement it will retain actual and exclusive possession of all said commodities, and will not permit or suffer the Company, or any of its agents, to have possession, either actual or constructive thereof, it being understood and agreed, however, that with the consent of the Warehouseman, the Company and its employees may enter the warehouse space, and under the supervision of employees of the Warehouseman, deliver thereto commodities for storage, perform such acts as are necessary in the care and preservation of the same while stored, and accept delivery of commodities which are designated and released from storage by the Warehouseman.

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

(b) Delivery by the Warehouseman of any of the said commodities as hereinafter provided shall constitute a complete discharge of any liability on the part of the Warehouseman to the Company and the Bank as to such commodities delivered.

(c) The Company agrees to hold the Warehouseman harmless from any claims, demands, suits of any nature whatsoever which may be made or brought by reason of this agreement and any acts thereunder, excepting such claims as may be made by the Company against the Warehouseman by reason of its failure to exercise that degree of care in the safekeeping of said commodities which a reasonably careful man would exercise in regard to similar commodities of his own.

(d) The Company agrees to pay the Warehouseman as compensation for services hereunder the fees and other charges as set forth and in the manner provided in that certain Field Warehouse Storage Agreement between Lawrence Warehouse Company and Central Auto Supply, dated July 26, 1946.

(e) It is understood and agreed between the parties hereto that the Warehouseman shall in no event be obligated to deliver any of the commodities covered by this agreement, until the Warehouseman shall have been paid in full outstanding and unpaid fees and other charges at the time of such delivery. It is further understood and agreed that

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

any unpaid fees and other charges shall constitute a warehouseman's lien against any or all of the commodities at any time deposited and remaining in the warehouse.

(f) The Warehouseman shall be bound only by its own inventories, warehouse receipts and records.

(g) The Warehouseman agrees that it will issue a non-negotiable warehouse receipt, or receipts, to the Bank covering the commodities described on the original inventory to be prepared as hereinafter provided and will thereafter at least once each week, issue further non-negotiable warehouse receipts to the Bank covering commodities which have been delivered into said warehouse during the preceding week and not covered by a previously issued warehouse receipt.

4. The Company agrees that it will maintain during the term of this agreement such insurance, if any, as is required by the Bank, and will cause all policies to contain a clause making the loss, if any, payable to the Warehouseman and to the Bank as interest may appear, and the Bank and the Warehouseman need not carry such insurance.

5. The Warehouseman agrees that it will, with all convenient and reasonable dispatch, take and prepare, in triplicate, a complete inventory of the commodities delivered to it, using thereon the description furnished to it by the Company of said commodities. The Warehouseman agrees to issue

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

to the Bank its Non-Negotiable Warehouse Receipts for all of said commodities as shown on said inventory.

The Warehouseman agrees to keep a complete record of additional commodities delivered by the Company into the warehouse for the account of the Bank, using thereon the description furnished to it by the Company of said commodities, and at least once each week to issue to the Bank its Non-Negotiable Warehouse Receipt for all of said commodities so delivered to it. Each such Non-Negotiable Warehouse Receipt shall bear the following legend:

This Warehouse Receipt is issued to cover commodities received at the warehouse between and, both inclusive, and is subject to deliveries made from the warehouse by the Warehouseman during the same period under instructions from the Warehouse Receipt holder. Documents covering commodities received and delivery orders covering commodities delivered are on file at the warehouse.

The Warehouseman agrees that it will from time to time, upon request of the Bank, take a complete inventory of all commodities in storage in said warehouse and will thereupon issue to the Bank a new Non-Negotiable Warehouse Receipt or Receipts showing the commodities on hand in lieu of all outstanding Warehouse Receipts and upon delivery thereof to and acceptance by the Bank, the Bank

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

agrees to surrender simultaneously to the Warehouseman all then outstanding Warehouse Receipts.

The Company agrees, that on such form and in such manner as is requested by the Warehouseman, it will certify and guarantee its legal ownership of all of the commodities deposited with the Warehouseman, that the quality and quantity stated on such forms are correct and that said commodities are delivered to the Warehouseman for warehousing purposes in accordance with the terms of written agreements executed by the Company. The Warehouseman shall not be liable for any errors or inaccuracies in any description furnished by the Company.

6. The Warehouseman agrees to deliver any commodities in its possession, represented by non-negotiable warehouse receipts or held pursuant to this agreement, in accordance with any Delivery Instructions in writing, or Order for Warehouse Release delivered to the Warehouseman by the Bank. It is mutually agreed that any Delivery Instructions in writing or Order for Warehouse Release received by the Warehouseman shall not give the Company any right, title or interest in or to any of the commodities stored pursuant to this agreement until the actual delivery thereof by the Warehouseman to the Company.

7. It is mutually agreed that nothing herein contained shall in any manner whatsoever be construed

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

as a commitment on the part of the Bank to extend any credit or to make any loan or loans to the Company, the Bank expressly reserving unto itself the right to extend such credit or make such loans to the Company as in its absolute discretion it may deem advisable and to terminate such credit, as to any future loans, at any time at its option and in its sole discretion, and to proceed to the collection of any indebtedness in accordance with any collateral agreement or collateral note made by the Company to the Bank.

8. It is mutually agreed that all commodities of like description stored pursuant to this agreement may each be warehoused as one general lot of fungible goods, and that the holder of a warehouse receipt shall be entitled to such portion of each such general lot as the amount of each commodity represented by such receipt bears to the whole of such general lot of such commodity.

9. This agreement shall remain in full force and effect until such time as the Bank shall notify the Warehouseman, in writing, that its obligations as a warehouseman have been completely fulfilled and discharged, provided, however, that the Warehouseman shall have the right to terminate and cancel this agreement at any time upon giving thirty (30) days' written notice to the Company and the Bank if the Company is in arrears in payment of charges or fees or is interfering with the operation of the

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

warehouse above referred to. The termination or cancellation of this agreement shall not terminate or cancel said Field Warehouse Storage Agreement hereinbefore referred to, nor the liability of the Warehouseman on any Warehouse Receipts outstanding.

10. It is mutually agreed that this agreement shall be construed in accordance with the Uniform Warehouse Receipts Act of the State in which said warehouse is situate, and from and after delivery into the said warehouse, all commodities shall be governed by and be subject to the provisions of said Act.

In Witness Whereof, the parties hereto have caused this agreement to be executed in quadruplicate by their proper corporate officers and their corporate seals to be hereunto affixed, the day and year first above written.

J. S. HOLMES,
R. E. KERSTING and
W. L. HARGROVE d/b/a
CENTRAL AUTO SUPPLY.

[Seal] By /s/ R. E. KERSTING,
Partner.

Attest:

/s/ J. S. HOLMES,
Partner.

/s/ W. L. HARGROVE,
Partner.

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

LAWRENCE WAREHOUSE
COMPANY.

[Seal] By /s/ E. C. YUILLE,
Vice-President.

Attest: .

F. C. HEDGER,
Assistant Secretary.

VALLEY NATIONAL BANK.

By /s/ P. W. FETCHER,
Vice-President.

Attest:

/s/ A. K. WILDMAN,
Assistant Cashier.

Lawrence Warehouse Company
Field Warehouse Lease

This Indenture, made in the City of Phoenix, County of Maricopa, and State of Arizona, this 30th day of July, 1946, by and between J. S. Holmes, R. E. Kersting and W. L. Hargrove a partnership doing business under the trade name and style of Central Auto Supply, a partnership, hereinafter called the lessor, and Lawrence Warehouse Company, a California corporation, hereinafter called the lessee;

Witnesseth:

Whereas, the lessor is the owner of the real

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

estate, together with all improvements thereon, situate in the City of Phoenix, County of Maricopa, and State of Arizona, described as follows: viz: That certain brick and concrete building located at 601-609 E. Adams St., Phoenix, Maricopa County, Arizona.

[In longhand]: Cancelled by lease dated 3/17/47.

Now, Therefore, the lessor hereby rents, demises and leases, and the lessee hereby hires and takes of and from the lessor that part of the aforesaid premises described as follows, viz:

Those certain storage spaces located in the above-described building; said spaces being more particularly described as follows: That certain storage space located in the main portion of said building—said space being fifty six (56') feet in its greatest north and south dimension and fifty (50') feet in its greatest east and west dimension, and also

That certain storage space located adjacent to and immediately west of the above-described area—this space being twenty-five (25') feet by nineteen (19') feet.

The above-described spaces as shown outlined in red on plat marked "Exhibit A" attached hereto and made a part hereof.

with the appurtenances, together with the full right of ingress and egress to and from said premises,

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

over and through any other premises of the lessor, to be occupied for the conduct of a field warehouse on a tenancy from month to month, and until said tenancy shall be terminated by a thirty (30) day written notice given by either party to the other, for the aggregate rental of One Dollar (\$1.00), the receipt of which is hereby acknowledged; provided, that no notice of termination by lessor shall become effective unless all warehouse receipts, or other evidence of the storage, representing commodities stored in or on said premises, or any part thereof, issued by lessee shall have been surrendered to lessee and cancelled, and all charges of lessee due or to become due in connection with the operation of such warehouse shall have been fully paid.

The lessor covenants and agrees that the lessee may place on, in or adjacent to said leased premises, such signs and other evidences as it may deem necessary to indicate its possession of the leased premises and of the commodities stored therein or thereon, and further that the lessee shall have the paramount right at all times during the term of this lease to use any facilities of the lessor for receiving, handling, weighing, storing, caring for, packing, shipping and delivering any stored commodities.

It is expressly understood and agreed that the lessor shall not have access to the leased premises or to the commodities stored therein or thereon, provided, that, with the consent of the lessee, the lessor may enter the warehouse conducted on said

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

premises and, under the supervision of the lessee, deliver thereto commodities for storage, perform such acts as are necessary in the care and preservation of the same while stored and accept delivery of commodities which are designated and released from storage by the lessee, and for the further purpose of making repairs as hereinafter provided.

The lessor agrees with the lessee that it will at its own cost and expense keep said demised premises in good order and repair, and that the lessee shall not be called upon or required to make any repairs of any kind or nature to, in or about said demised premises; and said lessor hereby covenants and agrees to indemnify lessee against any claim, expense, loss or damage suffered by lessee as a result of its occupancy of the premises and against any loss or damage to commodities which may be stored in said premises by the said lessee; and said lessor holds said lessee harmless from any damage or loss that may come to any commodities stored in said premises, irrespective of the nature or cause of said damage or loss.

Should the lessor violate any of the terms or conditions of this lease, or in any manner interfere with, or make difficult the duties of the agents, servants, or employees of the lessee; or become insolvent, or should the premises hereby leased become involved in any manner in litigation, or should the lessor or the lessee be ejected or ousted therefrom,

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

or proceedings be begun for that purpose; or should the lessee at any time deem it necessary for the protection of its interests or of the commodities stored, then the lessee shall have the right to remove all commodities from the premises herein described to such other place or places as the lessee may deem proper or expedient; and in case of any such removal the lessor undertakes and agrees to pay the lessee all expenses of such removal and of storing said commodities elsewhere in addition to any other proper charges against said commodities.

The lessor warrants and guarantees the peaceful possession of the premises by the lessee and agrees to indemnify and hold the lessee harmless of and from any and all claims and expenses incurred or assumed by lessee in defending or maintaining possession of said premises. The lessor agrees to execute or cause to be executed any further agreement or agreements that may be necessary to secure the convenient use and enjoyment of the premises hereby leased by the lessee.

Said lessor further agrees with said lessee to pay for all gas, electricity, light, heat, power, steam, water or other utility supplied to or used upon said demised premises during the term of this tenancy.

The lessee, without the consent of the lessor, shall not for all or any part of the term herein granted, sublet the said premises nor assign this lease.

In Witness Whereof, lessor has caused this in-

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

strument to be executed by a partner thereunto duly authorized, and lessee has caused this lease to be executed by its proper corporate officers and its corporate seal to be hereunto affixed the day and year first above written.

J. S. HOLMES,
R. E. KERSTING and
W. L. HARGROVE, d/b/a
CENTRAL AUTO SUPPLY,
Lessor.

[Seal] By /s/ R. E. KERSTING,
Partner.

Attest:

/s/ J. S. HOLMES,
Partner.

By /s/ W. L. HARGROVE,
Partner.

LAWRENCE WAREHOUSE
COMPANY,
Lessee.

[Seal] By /s/ E. C. YUILLE,
Vice-President.

Attest:

/s/ F. C. HEDGER,
Assistant Secretary.

(Testimony of Robert E. Kersting.)

Plaintiff's Exhibit No. 1—(Continued)

Assent—Use If Lessor Is Not Owner
Of Within Described Premises

Now comes owner of the property described in the foregoing lease, and hereby consents to the making of said lease.

.....
.....

(Individual or Partnership Form)

State of Arizona,
County of Maricopa—ss.

I, Polly Smith, a Notary Public in and for said County and State aforesaid, do hereby **Certify that** R. E. Kersting, J. S. Holmes and W. L. Hargrove personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act and deed for the uses and purposes therein set forth.

Given Under My Hand and Notarial Seal this 30th day of July, A.D. 1946.

[Seal] /s/ POLLY SMITH,
Notary Public.

My Commission Expires 6-18-48.

Admitted and Filed March 17, 1949.

[Endorsed]: Filed March 30, 1950.

(Testimony of Robert E. Kersting.)

Q. (By Mr. Perry): Mr. Kersting, I show you Plaintiff's Exhibit No. 1 in evidence. I will ask you if you are familiar with those documents?

A. Yes, sir.

Q. And I will ask you if the top document there that is marked "Lawrence Warehouse Company, field warehouse lease," was the document that was in effect at the time of the adjudication of bankruptcy? [5]

A. Well, I believe it was in effect, or a similar document, and as I read it over, I see it is dated March 17th, 1947, and signed by myself, so it must have been the one that was in effect.

Q. And the pledge immediately under that, does that correctly delineate by red lines the portion of the property covered by the lease to which you have just referred?

A. I believe that is correct.

Q. Now, after the execution of this field warehouse release or field warehouse lease, your Company, the Central Auto Supply Company, continued to operate the business, is that right?

A. That is correct.

Q. And what was your business?

A. The sale of auto accessories and the operation of a machine shop, automotive machine shop.

Q. And after the execution of this lease, you just tell the Court how the business was operated with reference to what your Company did, and what the Lawrence Warehouse Company did, so

(Testimony of Robert E. Kersting.)

we will have a picture of how the operations were conducted.

A. Well, just a small prologue, and not to take up the time of the Court or anything, but we were in certain financial difficulties due, mainly, to the strike of our major suppliers, the Seal [6] Power Corporation. This Company was responsible for a little over 50 per cent of the volume of our sales. They went on strike and remained on strike for eight months. We took no deliveries, and that explains our financial stress, and we went first, I believe, to the Valley National Bank in the hopes of getting some type or some form of financing that would help carry us through this strike period, for, of course, we had no idea it would last for seven or eight months, we hoped it would be over in two or three weeks. I don't know exactly how it came about, but at least in cooperation with the Valley Bank and the Lawrence Warehouse Company, a Lawrence field warehouse application was necessitated, which you have just introduced in evidence here. My understanding of that operation was roughly this: I don't claim to be an authority on the technical parts of it, but we had certain inventories, certain merchandise in the shop at the time. In order to increase our volume we wanted to increase our inventory to more adequately compete with the other plants in the area here. The bank and the Lawrence Warehouse showed us that if they could control a certain por-

(Testimony of Robert E. Kersting.)

tion of our building, a certain portion of our inventory; that is, the portion of the building [7] which would contain our inventory, and through some operation of some type of warehouse receipt, if we would pledge that inventory that was already there and then also the new inventory as it came in, that is, as it was purchased from our distributors, and if we allowed them to keep complete control of that inventory as to what came in and what went out, the Valley Bank then would lend us a certain sum of money, a certain percentage on the cost value of that inventory as against these warehouse receipts or whatever they were, whatever we wanted to technically call them. The percentage of the loan from the Valley Bank, I believe, ran somewhere between 50 and 60 per cent. It varied up and down for a time, and we, of course, the unfortunate part of it was, we never knew what it was going to be. The next morning it would be cut down to 10 per cent, and we could be out of business by having to immediately pay the Bank that amount. As our inventory came in and came in higher, of course we were entitled, technically, to more money, more of a loan on that pledged inventory to the Bank. As I understood it, the warehouse system was merely the middle man to control and check on that inventory and see what happened to it, supposedly, and the Bank, in turn [8] loaned us money on what was pledged.

Q. Now, the portion of your warehouse or store room, or whatever it was that was leased to the

(Testimony of Robert E. Kersting.)

Lawrence Warehouse Company as shown in the red lines on the pledge I showed you a few moments ago, how was that separated from the balance of the building?

A. Either by walls or built over wire gauging similar to chicken wire, and at the close of business each day it was more or less self contained in this chicken wire, in some cases by folding doors which could be folded shut and then locked with a padlock.

Q. Now, was there any portion of your stock of merchandise that was offered for sale that was not contained within this area that was enclosed by chicken wire or walls or the area that is shown on the plat in red?

A. Yes. For a time there was a small portion of it in a smaller building next to the main building known as the carburetor and electrical shop. There was a certain inventory kept in there that was not in the warehouse system, and also there was our larger machine shop in the rear which was not contained in the warehouse, and there were certain parts out there at all times, of course, of considerable value.

Q. In percentage, would you say that the greater portion of your stock was within this enclosure that you mentioned?

A. I'd say at least 90 per cent, possibly more than that.

Q. At all times? A. At all times.

Q. Now, will you just tell the Court, assuming

(Testimony of Robert E. Kersting.)

that a purchaser came in to buy an item while this arrangement was in effect, what the operations were that resulted in the sale and delivery to him of whatever he wanted to purchase?

A. If a purchaser came in the front door, you mean, in person?

Q. Yes.

A. In this case? Well, he would walk up to the counter and he would ask for gasket for a Model A Ford, which we never had, and the man at the counter would go back to the stock and withdraw that gasket for a Model A Ford and bring it out to him and ask him whether it was charge or cash. If it was cash, he would pay his \$2.28 in cash and get a ticket. On the ticket, which would be a Central Auto Supply invoice, it would show "One Gasket, \$2.28, paid." [10]

Q. This is a cash sale?

A. This is a cash sale, yes. The counter man would take the money and give it to the Cashier and she would ring it up as cash. If it were a credit sale the same thing would happen except the money would not be transferred, would be written up on the invoice as a charge to a certain company, and the customers would sign for the charge. Now, that was the outside part of it. Now, you want—

Q. Go right ahead.

A. The inside part?

Q. Yes.

A. Then, operating under the Lawrence System,

(Testimony of Robert E. Kersting.)

and again, now, I am just speaking from the association I had there from what I saw and what I know. Now, there might be some technical parts I am not right on or don't know about, because it was a little complicated, I will grant you that. As I understood it, that counter man would then take his tickets, take the tickets, whether they were charge or cash tickets, and I means by "tickets," the invoices here, and give them to our office girl, and she would process them during that day or at the end of the day, or during the next day. We usually were two or three days behind with them as any business is, and in processing them she [11] would by some kind of a list or recording method, would note the number of units that were allowed, the units being, just for instance, a gasket, as I said, would be one unit, or a box of tools might be another unit, some type of unit designation, and would cost the tickets. Now, whether the office girl did this costing or whether the order desk man or a Lawrence employee did it, I am not too clear on that, but somebody at least in the organization did cost them, arrive at our cost figure from catalogues, and so on.

Q. Who handled the money, assuming I went in there and bought a gasket for \$2.28, what became of that \$2.28?

A. The cashier would handle the money and put it in the cash register.

Q. Well, would that be the Central Auto Sup-

(Testimony of Robert E. Kersting.)

ply or the Lawrence Warehouse, is what I am trying to get at?

A. It would be the Central Auto Supply.

Q. Then what became of that money?

A. Well, the money was deposited in the bank account of the Central Auto Supply, or in some cases was used for paid-outs, small cash paid-outs, but it was used as any normal business would use the money. [12]

Q. Do you know whether the Lawrence Warehouse employees had anything at all to do with the money that came in?

A. Well, yes, in certain instances they would receive the money. In other words, generally the counter man, the head counter man, would be, at least, the Lawrence Warehouse employee. He would take the money of the cash sale from the customer and then give it to our cashier through a little cage.

Q. And your cashier saw that it went into the bank to your account?

A. That is correct.

Q. And you had it for any expenses that you had in the business, the expenses or the payment of the indebtedness to the Valley Bank or anything else?

A. Any place it could be used, yes, that is correct.

Q. I wish you would give the Court one more illustration, Mr. Kersting. Supposing you were buying from a distributor on an open account and

(Testimony of Robert E. Kersting.)

the distributor shipped goods to you on an open account, how, then, were those goods handled? In other words, what I am trying to get at is, did that go into the Lawrence Warehouse inventory [13] and warehouse receipts issued against them?

A. That is correct, yes, they were handled like any—I mean, whether we paid cash for goods that came in or whether they came in on credit, they still went right into the Lawrence Warehouse system.

Q. In other words, if a distributor sold you goods on credit, then am I correct, that as soon as those goods arrived and before they had been paid for by you, they were placed in this inventory and the Lawrence Warehouse Company issued its warehouse receipt to the Valley Bank for that?

A. Well, the first part of your question, yes, they were immediately put in the inventory and we, within due course of processing, as rapidly as possible reported them as entering the inventory, and then they were used, yes, as a credit, or sooner or later placed on some type of warehouse receipt.

Q. Regardless of whether they had been paid for in cash or whether you had them on credit?

A. That is right.

Q. Now, was there any check in the amount, or was there any limit on the amount of merchandise that you could sell in any one day or in any one week, or anything of that sort? [14]

A. Toward the middle of this system, and from

(Testimony of Robert E. Kersting.)

then on there were limits placed on the amount we could sell, that is the amount we could sell on open account. I believe, as I understood it, that at any time we could sell anything we wanted to, I mean, we could sell our whole inventory if we could pay for it right away and if we could pay the Bank off the amount that we owed them.

Q. In other words, if a purchaser went in with the cash he could have bought the entire inventory from you?

A. Well, now, toward the end, now, of course, things were getting pretty stormy, and everyone was running around with padlocks and everything else, but I know there was a period in there, I know, for instance, that we could have called the Bank and said, "Now, we can sell all of this for 45,000 here tomorrow morning," and they would not only have said, "All right," they would have helped us, I know that.

Q. Now, this money you borrowed from the Bank on the security of these warehouse receipts, you made some payment on that, did you, from time to time?

A. Would you say that again?

Q. Now, what I am trying to get at is this: [15] You borrowed money from the Valley Bank and warehouse receipts were issued against this stock to the Valley Bank. Now, did you, from time to time, make payments on that indebtedness to the Valley Bank?

A. I believe that there was some repayments in

(Testimony of Robert E. Kersting.)

there. They would not have been very much, very many, but I believe there were some renegotiations or repayments of parts to them. Again, I cannot say for sure, but as I think a little more on that last question, I am pretty sure now I can say there were several payments that we made by check as an adjustment on this over control of our limits in there. I am sure the records might show some checks paid against that. At least, that is my remembrance now.

Mr. Perry: You may cross-examine.

Cross-Examination

By Mr. Craig:

Q. Mr. Kersting, you weren't actively participating in this operation, were you, in the sense—of course, you were interested in seeing that the business made a success, but you weren't actually spending all your time up there worrying about the operation, the physical operation of that business, were you?

A. Not until the last few months. I'd say the last few months I spent about, maybe, 75 per cent of my time there.

Q. Yes, would you say about the last three or four months of the operation?

A. That is about correct.

Q. And at that time you were trying to salvage what you had in the business and see if you could not either make it go or wind it up, is that correct?

(Testimony of Robert E. Kersting.)

A. That is correct. I represented about \$55,000 worth of investment in there by myself and other stockholders, other people who had put money in there, and I was trying to see if we could recoup a part of it, which we didn't.

Q. But prior to that period in which you were in serious financial stress, I mean, when the business was in serious financial stress, you didn't actively go out there and supervise these counter men, or anybody else particularly, did you?

A. Well, now, to honestly answer that question, I didn't spend all of my time there, no. I had spent, I imagine, during the early part of the Company's existence, the six or seven months prior—the last three months maybe I spent 20 or 25 per cent of my time there, but I'd go there and visit [17] the Company at least once a day.

Q. To see how they were getting along?

A. To see how they were getting along and then also to direct the policy of the men who supposedly were carrying this thing out.

Q. At the time this plan of financing was introduced originally, other than assisting to set up that financing plan, you had no particular active participation in the business, did you?

A. You said prior to this plan for financing?

Q. At the time the plan was originally introduced during the life of the copartnership? As I understand you, Mr. Kersting, you established this business or became interested in this business when

(Testimony of Robert E. Kersting.)

it was the Piston Service down on South Central Avenue?

A. That is right, yes.

Q. And at that time it was a copartnership?

A. That is right.

Q. And it was about that time that you changed the name to the Central Auto Supply, and it was still a copartnership, so the strike came along and you set up this financing plan with the Valley Bank and the Lawrence Warehouse Company?

A. Yes.

Q. Then shortly thereafter you moved over to your new location?

A. That is correct.

Q. Now, other than to assist your copartners and others interested in this business in getting these instruments properly executed and getting the thing set up in a proper manner, you weren't then actively supervising the business other than occasionally going down to see how it was getting along, and, of course, interested in your investment?

A. Well, I don't think that would be the fair statement, Mr. Craig. I'd say largely before that time I became pretty interested in its operations because of the stockholders that I represented in there, and I took these steps—I flew back to Muskegon, Michigan, to our distributor there, and spent about four days there explaining the Lawrence System to them, explaining what we were doing, and hoping we could work out something with them. I spent many, many long hours in the

(Testimony of Robert E. Kersting.)

Valley Bank there trying to borrow thirty and getting five, I mean, the typical bank operation, and spent an awful lot of time during that six or eight months in there.

Q. Yes, but, Mr. Kersting, maybe you didn't understand what I am getting at. Those activities which you have just related were necessary to the placing in operation of this financing plan, weren't they? You were vitally interested in that and you did a lot of work in that respect?

A. That is right.

Q. But at the same time you weren't actively going down there and pulling gaskets off the shelf and various things, and selling them over the counter, or telling somebody else to sell them over the counter, or anything of that nature, did you?

A. To this extent, that along with these operations here, and I am not trying to extend this, but I want to get at what I know, I mean trying to tell everything I know factually. We instituted a George S. May Company survey a little prior to this operation here, which is a business engineering firm. I mean their intent is to show you how to operate your business efficiently and make money, and I did spend a lot of time with the people that ran that survey, and got to know quite a bit of the technical problems in the business. To answer your question thoroughly, the second part of it, I didn't go and pull gaskets off the wall or sell parts down there. I have done it, but I mean it was not the general practice. [20]

(Testimony of Robert E. Kersting.)

Q. Now, as I understand your testimony, Mr. Kersting, this merchandise that was pledged to the Valley National Bank as security for their loan was fenced off and kept separate from the other property in your business, is that correct?

A. Yes, that is a correct statement.

Q. And the custody of that merchandise was, so long as it was in that area, was in the Lawrence Warehouse Company?

Mr. Perry: Just a moment, if the Court please, I object to that as calling for a conclusion of the witness.

The Court: Probably so.

Mr. Perry: That is a matter for the Court to determine.

Mr. Craig: The physical custody of the property, Mr. Kersting, to your knowledge, was in behind these fences of the Lawrence Warehouse Company, is that correct?

A. What do you mean by "custody"?

Q. Well, where the goods were finally placed.

A. Placed, yes, they were behind Lawrence Warehouse gates.

Mr. Craig: I wonder, to save time, if we could have all of these photographs marked as one exhibit?

Mr. Perry: Sure. [21]

(Thereupon the documents were marked as Defendants' Exhibit—Lawrence Warehouse Exhibits A and B for identification.)

(Testimony of Robert E. Kersting.)

Mr. Craig: Now, Mr. Kersting, I show you a set of photographs marked Lawrence Warehouse Exhibit A for identification, and I will ask you if those photographs truly represent your place of business during this period, and trying represent the manner of posting the signs and notices on the premises? A. Yes, I believe they do.

Q. Now, Mr. Kersting, in the course of your operations did you prepare or have prepared, or did your Company prepare a pamphlet that you showed to these supply houses that you were purchasing commodities from or others interested in your operations?

A. A pamphlet relating to what?

Q. Well, your business operation and what you were doing, the proposed method of financing, possibly, and what activities you were engaged in.

A. I recall planning one, but I don't recall it. I recall working on something like that. A part of it was in connection with the May Company's survey and recommendation. We also always wanted some type of operational capital. I can't pin [22] right down what you are referring to, or remember it exactly though.

Q. Well, I will show you—(handing a document to the witness).

A. Oh, yes. Now, when you say "pamphlet" we did prepare and create a loose leaf photograph to accomplish the job of explaining in more or less catalogue form. Yes, I am very familiar with that.

(Testimony of Robert E. Kersting.)

I was thinking of something printed and could not recall what you were referring to.

Q. I refer now to Defendant Lawrence Warehouse Company's Exhibit No. B for identification and ask you if that is a portion of that loose leaf album that you referred to, and whether it truly depicts the front of your store building on East Adams Street and also the inside of the store building, the front counter?

A. Yes, I believe that is one of the loose leaves from it. I think in fairness I ought to say that this was one of the last things that was prepared or was done in the Company. I mean it was very much toward the end.

Q. Toward the end of your operations?

A. That is right, yes, sir.

Q. Now, Mr. Kersting, when you entered into this financial arrangement with the Valley National Bank and the Lawrence Warehouse Company, your business—your corporation or copartnership actually received the money from the Valley National Bank, did it not? You got a loan from the Valley National Bank? A. That is right, yes.

Q. Your business received the money from the Bank?

A. From time to time different amounts.

Q. Yes, that was the whole intention of this financing plan was to get money to operate on, wasn't it?

A. And to build the inventory, yes, not only to get the money, but to build your inventory up.

(Testimony of Robert E. Kersting.)

Q. That is right, you borrowed it to build the inventory up in order to keep doing business?

A. That is right.

Q. And in order to get the money to help build that inventory up, you borrowed it from the Valley National Bank?

A. That is correct.

Q. And they would not lend it to you unless they had some kind of security, isn't that right?

A. That is usually the practice.

Q. Well, that was right in this case anyway, wasn't it? [24]

A. Yes.

Q. And that security was represented by this stock of inventory that you had there and which you kept bringing in?

A. That is a true statement if you add to it, it was also represented by a mortgage against the building and the property and a mortgage against certain machinery, and so on. In other words, everything was in hock, that is true.

Q. Everything was in hock with the Bank to finance this operation?

A. That is right, and the Lawrence plan was a part of it, too, in hock.

Q. Now, with respect to these daily transactions in the sale of this merchandise, as a matter of fact, Mr. Kersting, your business was allowed to sell a certain amount by a specific release from the Valley National Bank each week, wasn't it?

A. As I testified before, I believe there was—there were certain limits placed on the amount that

(Testimony of Robert E. Kersting.)

we could sell during a time period. I think there was probably a time period when there weren't limits on the amount that could be sold, and following up to answer your question, yes.

Q. Do you recall whether or not there was not—in the original instance there was not a \$5000 [25] limit placed on it?

A. That could be true. As I say, I don't recall exactly.

Q. And toward the end of the operation, that limitation was cut down to \$500?

A. I could not say that.

Q. You don't recall one way or the other on that? A. No.

Q. Now, do you recall the reason for releasing of the goods was because of this position of your loan with the Bank?

A. That is true in a sense, yes, I do recall that we were to have a loan on a certain percentage of the inventory, we will say, 55 per cent, and when our inventory went down, when it was reduced to below the 55 per cent, if I made myself clear there. Of course, the Bank wanted one of two things to happen, either the inventory to increase some way, or for us to make a payment in cash against the loan, or it would remain at 55 per cent, and a little embarrassing part in there, we never knew from day to day what percentage the Bank was going to apply. It might be 70, 80, or 10 or 5, and when they did change, of course, the change was always the wrong way, of course. [26]

(Testimony of Robert E. Kersting.)

Q. As far as you were concerned?

A. As far as we were concerned.

Q. You mentioned some time ago in your testimony, Mr. Kersting, the possibility of selling a considerable portion of your stock there or your inventory at one particular time. Did you ever attempt to sell, say, an amount of \$5000 worth of your inventory at one time?

A. Yes, we did.

Q. And what happened?

A. Well, we didn't find the proper buyer.

Q. Well, you didn't have a purchaser for that amount?

A. That is right, yes.

Q. Did you have any relations with the Bank or with the Lawrence Warehouse Company about such a sale?

A. Well, to this extent, that over and over again I do recall this, that we were limited as to what we could sell in a given week on open account. That was—but I, over and over, had this idea, that we could sell anything for cash if we could go down to the Bank then and reduce—I mean, pay the Bank for what we sold. In other words, if we could sell \$10,000 on Tuesday morning, that was fine, but we had to take \$10,000 and put it right [27] down in the Bank, but we could make the sale. Now, that was my understanding.

Q. In other words, in order to release merchandise for a set sale, you would have to notify the Bank that the sale was made and you would place

(Testimony of Robert E. Kersting.)

that money with the Bank in payment on their loan, is that right?

A. I don't believe so, Mr. Craig. We had to notify them, that is true, but not prior to the sale. We had to notify them after the sale what had been realized.

Q. That is your present recollection of what the arrangement was?

A. That is my present recollection, yes.

Q. But you never actually sold such a quantity of goods to any one person?

A. Well, we did sell over our limit a number of times and either made the payment or had an argument about it, one or the other.

Q. Did you ever receive any instructions with respect to the delivery of merchandise down there, Mr. Kersting?

A. Instructions from who?

Q. From the Valley National Bank.

A. I would not doubt it. I mean I am sure we had correspondence and negotiations on what was to [28] be done or not to be done.

Mr. Craig: Mark that, please, for identification.

(The document was marked as Defendant Lawrence Warehouse Company's Exhibit C for identification.)

Q. (By Mr. Craig): You actually received instructions, or your corporation down there received instructions from time to time about this operation from the Bank?

(Testimony of Robert E. Kersting.)

A. I am sure we did, yes.

Q. And from the Lawrence Warehouse men that were on the job down there? A. Yes.

Q. You recall ever having seen the original or a signed copy of that particular letter which is marked as Defendant Lawrence Warehouse Company's Exhibit C for identification (handing the document to the witness).

A. I don't believe I ever saw this. I notice it concerns Mr. Saxon, the Receiver, so I suppose it was in effect after the bankruptcy had been entered into and I had no further contact down there. I don't recall this.

Q. You don't recall?

A. It is very possible it was used.

Q. You referred to Mr. Saxon. Was he in your employ prior to his appointment as temporary Receiver?

A. He was General Manager of the Company.

Q. And he was in charge of the operations down there? A. That is correct, yes.

Q. Now, Mr. Kersting, referring to this lump sale and the possibilities of which you have spoken, do you know of your own knowledge of any steps taken, that would have to have been taken under this arrangement with either the Lawrence Warehouse Company or the Valley National Bank, were there any documents that you had to sign or have had to sign?

A. You are referring to saying I could sell \$6000 worth some morning?

(Testimony of Robert E. Kersting.)

Q. Yes, that is right.

A. Yes, and I believe this would happen. A customer would come and walk in and, say it would be Thomas Brothers, say they would like to buy a thousand dollars worth of water pumps, whatever we had on there, and I think we would have said, "We can't sell on open account that much, we had a limit. If you have the cash, fine." He would lay down a check for \$6000 on the table—you understand, I am giving you my impression or my opinion. I might be wrong. I am telling you what could [30] happen, and it did happen similarly this way: We would get up 6000 water pumps and deliver them COD. However, along with it would be some type of Lawrence Warehouse withdrawal form for so many used water pumps, 6000 water pumps at one dollar, \$6000, on withdrawal. We understood that we had a certain limit that we could not exceed per week, but that one piece of paper would not give them or it would not even enter into anything more until the end of the week, and maybe during the next three or four days we might take in \$12,000 worth of merchandise, so we would not have any—the idea was, we were bound up so that we could not remove more than a certain limit from that inventory, but if we removed 50,000 and put in 60,000, I never thought anyone would care about it, then at the end of the week it would come out and, we will say, we didn't get in any more inventory, we had gone over our limit by \$4000, we had sold 6000, we were bound to only release 2000. We

(Testimony of Robert E. Kersting.)

would make out a check for \$4000, and it would accompany a Lawrence Warehouse release, send the check down to the Bank, and everyone would be happy. That was my understanding.

Q. And until that payment was made to the Bank you could not get any more goods, is that right? [31]

A. You mean we could not get any more goods, you mean, buy or sell?

Q. You could not take any more out of the warehouse?

A. Oh, yes, I don't know why we could not. We could take any amount out if we paid for it.

Q. You mean if you——

A. Oh, you had gone over the limit at the end of the week?

Q. Yes.

A. I understand what you mean there. Yes, I think we were technically bound right there until the Bank had the check and had cleared it for that past week, and we were technically over our limit and should not be operating on Monday. This was a technical thing. We certainly would not have closed on Monday, we would have opened up there, because we felt we were technically clear with the Bank as long as they had the cash.

Q. Didn't they actually close you up on one occasion there when that situation existed?

A. Way toward the end, I mean toward the end of the operation we were closed. Why, I never did know for sure. There were many reasons.

(Testimony of Robert E. Kersting.)

Q. In the earlier part of your operation, Mr. Kersting, you had no difficulty at all with [32] exceeding your limits that you were allowed to sell down there, were you? That is, you had some difficulty in selling the stuff, so you had no problem to exceed your \$5000 limit a week, if that is what it was in the earlier period of the operation of this business?

A. You mean in other words our sales were so low that we didn't come close to that?

A. No, I mean did you come close to it or did you exceed it? I don't think you had difficulty in that respect.

A. Well, as I say, Mr. Craig, that limit, as I remember it, was changed from time to time. We never knew what it was going to be or how it was arrived at, or anything else on a certain limit. We did on occasions exceed it. We did go over it and had to make arrangements with the Bank either through a cash payment or renegotiation again or another conference, or something. Also, there were periods of time there when all our sales were so low it didn't approach the limit. That is true, it varied, though.

Q. Do you know, Mr. Kersting, what percentage of your sales were over the counter cash sales as compared with your other account sales, order sales and the like? [33]

A. Well, of course, that varied a great deal as these conditions arose, but I think normally, in the

(Testimony of Robert E. Kersting.)

normal operation when we were making money, it was about 90-10—only about ten per cent over the counter.

Q. And the rest of it came through orders?

A. Yes, through the order desk. Now, during the past—the last six or seven months of operation, that might be changed very drastically, and if it had changed, I'd have said the counter sales went quite a bit up in percentage because of the fact that we weren't doing a lot of selling, so the percentage changed around quite a bit.

Q. Do you know who, during this financial arrangement, was on the order desk in the back part of the store there? That is where the order desk was; wasn't it?

A. That is right, yes.

Q. Do you know what employee was back there? Was he an employee of the Lawrence Warehouse or the Bank, or of the Central Auto?

A. I always—my recollection is always that the man on the order desk was an employee, a technical employee, at least, of the Lawrence Warehouse Company. I don't recall of any time when there was not a Lawrence man there. [34]

Q. Now, who paid him?

A. Yes, he was paid, I believe, twice a week by check from the Lawrence Warehouse Company and they billed us for the exact amount of the check and we reimbursed them.

Q. They billed you for other things too, didn't they?

A. Yes.

Q. They billed you for service down there?

(Testimony of Robert E. Kersting.)

A. That is right.

Mr. Craig: That is all.

Redirect Examination

By Mr. Perry:

Q. Mr. Kersting, I don't quite understand about this Defendant's Exhibit B for identification. That is the picture of the outside and inside of the buildings.

A. Yes.

Q. Did I understand you that that was made up into a loose leaf book, or something?

A. Yes, it was a loose leaf folder. You can see the two holes here in the picture. The pamphlet, I mean the leather cover, I think that said, "Central Auto Supply" on it, and then there would be a number of those pictures just like this, and as you would turn the picture there would be a blank page, a page with a typewritten explanation. In other words, they were pictures of the building and the counter and then we would have piece by piece all the merchandise sold with explanations and prices, and so on.

Q. That, you say, was made up along the latter part of your operations?

A. Quite a bit toward the end, yes.

Q. And I believe the Company was adjudicated bankrupt in July of 1947. Could you tell us about how long it was before that, that this document was——

A. I am sorry, I couldn't give the exact date on it. That was one of the—it was one of our last

(Testimony of Robert E. Kersting.)

attempts to furnish the salesmen with some type of selling pamphlet that they could take around and show to their customers, but I am quite sure it was toward the last, oh, we will say, two months' operations.

Q. That is all this was, was a book for your salesmen to take around when they were getting orders?

A. That was the main idea, yes.

Q. I asked you awhile ago about the cash sales over the counter, who got the money there, and you said the Central Auto Sales. [36]

A. The Cashier, yes.

Q. And I don't believe I asked you with respect to the sales that you would make on credit when they were paid. Who got the money there?

A. For instance, the open account checks that came in?

Q. Yes.

A. Well, they went to the same person, the Cashier of the Central Auto Supply Company.

Q. And they were deposited——

A. In the general account.

Mr. Perry: I think that is all.

Mr. Craig: One more question.

Recross-Examination

By Mr. Craig:

Q. In the operation of your business, Mr. Kersting, did you and your associates contemplate at

(Testimony of Robert E. Kersting.)

all at any time that the Valley National Bank and the Lawrence Warehouse Company would receive the proceeds from your operations there, from the actual counter sales and the other transactions there?

A. Well, certainly, Mr. Craig. You mean for interest that was due on the notes?

Q. Interest and payments. [37]

A. For payment on the notes finally. Yes at all times when we entered into this financial arrangement we were sure that we could repay everything. I mean after all, this business had made \$5000 a month at one time net, and we certainly anticipated repayment of everything.

Q. Well, what I mean is, Mr. Kersting, did you anticipate that the Valley Bank or the Lawrence Warehouse would receive directly this cash that you had taken in over the counter, or for the sale of merchandise?

A. That is a peculiar question, that they would receive it directly?

Q. That they would receive it.

A. Directly?

Q. I mean that you would take that particular money and pay the Bank or the Lawrence Warehouse Company.

A. Well, only as these obligations might mature or only as the interest might be due and payable. In other words, the Valley Bank to us was just another creditor as anybody else. We would not pay

(Testimony of Robert E. Kersting.)

them any sooner or any later, if that is what you are driving at. They were usually the first creditor, I might say.

Q. Well, there was no arrangement from the Bank [38] or anybody else that they were going to sit down there over the cash register and take that money out as it came in, was there?

A. Well, anyone there——

Q. I mean what you expected, is not this right, Mr. Kersting? What you expected to do is try to run your business as profitable as you could and when these obligations became due from the Bank, why, you would pay them in your ordinary course of the business from the moneys you had deposited in your business account, that is correct, that is the way you were operating it?

A. Yes, I think that is true.

Mr. Craig: That is all.

Mr. Perry: That is all.

(The witness was excused.)

The Court: We will have our morning recess at this time.

(Thereupon a recess was taken, after which all parties, as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

Mr. Perry: If the Court please, the plaintiff offers in evidence the deposition of Harry Stock, which is designated in the Clerk's records as No. 10.

Mr. Craig: We object, if the Court please, to the introduction of the deposition, on the grounds that it is wholly immaterial and irrelevant to the issues in this case, has no probative value so far as the issues in this case are concerned, and there is no proper foundation laid for the majority of the questions in the deposition.

The Court: All right, it may be received subject to the objection.

Mr. Gust: May all of those objections go for both defendants?

The Court: Yes.

Mr. Gust: Whenever they are made.

Mr. Perry: I assume you want to make the same objection to all the depositions?

Mr. Craig: That is correct.

Mr. Perry: May the record so show?

The Court: They will be received subject to the objections.

Mr. Perry: That is, the deposition of C. D. Cadot, designated as No. 11 in the Clerk's records; the deposition of Paul S. Godber, No. 12; the deposition of J. C. Baldwin, No. 13; the deposition of E. R. Tolfree, No. 14; the deposition of F. A. Warburton, Jr., No. 15; the deposition of M. Blackburn, No. 16; the deposition of David Shapiro, No. 17; and the deposition of F. C. Westphal, [40] No. 18. As I understand your Honor's ruling, they are admitted subject to the objections made by counsel.

The Court: Yes.

PLAINTIFF'S EXHIBIT No. 2

Deposition of Harry Stock.

Interrogatory No. 1. State your name and address.

Answer to Interrogatory No. 1. Harry Stock, 3010-9th Avenue, Los Angeles, Calif.

Interrogatory No. 2. By whom are you employed?

Answer to Interrogatory No. 2. Merit Products Co., 3541 East Olympic Blvd., Los Angeles 23, Calif.

Interrogatory No. 3. State what office or position you hold in that company.

Answer to Interrogatory No. 3. I am the Manager.

Interrogatory No. 4. State how long you have been so employed by such Company, the different offices or positions you have held while so employed, and the periods during which you have held each such office or position.

Answer to Interrogatory No. 4. I have been employed by Merit Products Co. for the past two years and nine months. I have been the Manager during this entire period.

Interrogatory No. 5. Describe briefly your duties.

Answer to Interrogatory No. 5. It is my duty to supervise the operation of Merit Products Co., including purchasing, warehousing, selling, shipping and receiving of automotive replacement parts.

Interrogatory No. 6. Did your company sell any

Plaintiff's Exhibit No. 2—(Continued)

(Deposition of Harry Stock.)

merchandise to Central Auto Supply, Inc., a corporation, of Phoenix, Arizona, prior to its adjudication as a bankrupt in July, 1947?

Answer to Interrogatory No. 6. Yes.

Interrogatory No. 7. Of what did such merchandise consist?

Answer to Interrogatory No. 7. Automotive pistons and paint.

Interrogatory No. 8. Has your company been paid for such merchandise?

Answer to Interrogatory No. 8. Not entirely.

Interrogatory No. 9. If not, how much is due?

Answer to Interrogatory No. 9. \$419.30 is now due and has been due since May 1, 1947.

Interrogatory No. 10. Prior to your transactions with Central Auto Supply, Inc., did you or your Company receive any communications or statements in writing from said Central Auto Supply, Inc., with reference to its financial condition?

Answer to Interrogatory No. 10. No.

Interrogatory No. 11. At or before the time your merchandise was delivered to Central Auto Supply, Inc., were you, or your company, or any of its agents or officers advised that such merchandise when delivered was to be immediately delivered to Lawrence Warehouse Company and warehouse receipts issued therefor to Valley National Bank of Phoenix?

Answer to Interrogatory No. 11. No.

Plaintiff's Exhibit No. 2—(Continued)
(Deposition of Harry Stock.)

Interrogatory No. 12. If you, your company, or its officers or agents, had been so advised, would your company have sold and delivered such merchandise to Central Auto Supply, Inc.?

Answer to Interrogatory No. 12. No.

Interrogatory No. 13. During the course of your dealings with Central Auto Supply, Inc., did you, or your company, receive any form letters, mimeographed balance sheets or other communications from Mr. C. W. Saxon, Manager of said Central Auto Supply, Inc., or any other agent or officer thereof, apprising you or your company of the warehouse agreement between said Auto Supply and Lawrence Warehouse Company and the alleged lien of the Valley National Bank of Phoenix?

Answer to Interrogatory No. 13. No.

/s/ HARRY STOCK.

[Endorsed]: Filed August 6, 1948.

PLAINTIFF'S EXHIBIT No. 3

Deposition of C. D. Cadot.

Interrogatory No. 1. State your name and address.

Answer to Interrogatory No. 1. C. D. Cadot, 126 South Virginia Lee Road.

Interrogatory No. 2. By whom are you employed?

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of C. D. Cadot.)

Answer to Interrogatory No. 2. The Atlas Brass Foundry Company.

Interrogatory No. 3. State what office or position you hold in that Company.

Answer to Interrogatory No. 3. Secretary and Vice-President.

Interrogatory No. 4. State how long you have been so employed by such Company, the different offices or positions you have held while so employed, and the periods during which you have held each such office or position.

Answer to Interrogatory No. 4. Since 1942 to the present date I have held the office of Secretary of the Company, in charge of all office procedure, collections and credits, and in 1947 I was given the additional office of Vice-President.

Interrogatory No. 5. Describe briefly your duties.

Answer to Interrogatory No. 5. My duties are and have been general supervision of the office, sales, purchases, collections and credits.

Interrogatory No. 6. Did your company sell any merchandise to Central Auto Supply, Inc., a corporation, of Phoenix, Arizona, prior to its adjudication as a bankrupt in July, 1947?

Answer to Interrogatory No. 6. Yes.

Interrogatory No. 7. Of what did such merchandise consist?

Answer to Interrogatory No. 7. Automotive water pumps.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of C. D. Cadot.)

Interrogatory No. 8. Has your company been paid for such merchandise?

Answer to Interrogatory No. 8. No.

Interrogatory No. 9. If not, how much is now due?

Answer to Interrogatory No. 9. There is due us \$549.00.

Interrogatory No. 10. Prior to your transactions with Central Auto Supply, Inc., did you or your company receive any communications or statements in writing from said Central Auto Supply, Inc., with reference to its financial condition. If so, please describe each of such communications or statements, state how and when you received it, and hand it to the officer taking your deposition, to be marked as an exhibit to be attached to such deposition.

Answer to Interrogatory No. 10. Our first shipments were made to Central Auto Supply, Inc., during the month of July, 1946, and prior to those shipments we did not receive any communications from them, but in October, 1946, we received a letter prior to a shipment which we made them on November 5, 1946. We received a letter from Central Auto Supply, dated October 8, 1946, signed by R. E. Kersting, Vice President, and addressed to The Atlas Brass Foundry Company, which came through the usual course of the mails. It is marked "Exhibit A."

Plaintiff's Exhibit No. 3—(Continued)

(Deposition of C. D. Cadot.)

Interrogatory No. 11. At or before the time your merchandise was delivered to Central Auto Supply, Inc., were you, or your company, or any of its agents or officers advised that such merchandise when delivered was to be immediately delivered to Lawrence Warehouse Company and warehouse receipts issued therefor to Valley National Bank of Phoenix?

Answer to Interrogatory No. 11. No.

Interrogatory No. 12. If you, your company, or its officers or agents, had been so advised, would your company have sold and delivered such merchandise to Central Auto Supply, Inc.?

Answer to Interrogatory No. 12. No.

Interrogatory No. 13. During the course of your dealings with Central Auto Supply, Inc., did you, or your company, receive any form letters, mimeographed balance sheets, or other communications from Mr. C. W. Saxon, Manager of said Central Auto Supply, Inc., or any other agent or officer thereof, apprising you or your company of the warehouse agreement between said Auto Supply and Lawrence Warehouse Company and the alleged lien of the Valley National Bank of Phoenix? If so, describe each of such communications, balance sheets or statements, show how and when each was received, and hand it to the officer taking your deposition, to be marked as an exhibit to be attached to this deposition.

Plaintiff's Exhibit No. 3—(Continued)
(Deposition of C. D. Cadot.)

Answer to Interrogatory No. 13. No such communication was received, but on June 26, 1947, we did receive a mimeographed form letter signed by C. W. Saxon, General Manager. It is marked "Exhibit B." Enclosed in that letter was a mimeographed balance sheet. It is marked "Exhibit C."
/s/ C. D. CADOT.

[Endorsed]: Filed August 12, 1948.

PLAINTIFF'S EXHIBIT No. 4

Deposition of Paul S. Godber

Interrogatory No. 1. State your name and address.

Answer to Interrogatory No. 1. Paul S. Godber, 851 East Sixtieth Street, Los Angeles 1, California.

Interrogatory No. 2. By whom are you employed?

Answer to Interrogatory No. 2. Trojan Battery Company.

Interrogatory No. 3. State what office or position you hold in that Company.

Answer to Interrogatory No. 3. Vice President.

Interrogatory No. 4. State how long you have been so employed by such Company, the different offices or positions you have held while so employed, and the period during which you have held each such office or position.

Answer to Interrogatory No. 4. For about

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Paul S. Godber.)

twenty-one years. I have been Vice President for one year; Manager for five years, and Salesman for fifteen years.

Interrogatory No. 5. Describe briefly your duties.

Answer to Interrogatory No. 5. Acting as General Manager; also in charge of sales.

Interrogatory No. 6. Did your company sell any merchandise to Central Auto Supply, Inc., a corporation, of Phoenix, Arizona, prior to its adjudication as a bankrupt in July, 1947?

Answer to Interrogatory No. 6. Yes.

Interrogatory No. 7. Of what did such merchandise consist?

Answer to Interrogatory No. 7. Storage batteries.

Interrogatory No. 8. Has your company been paid for such merchandise?

Answer to Interrogatory No. 9. There is now a balance that is unpaid.

Interrogatory No. 9. If not, how much is now due?

Answer to Interrogatory No. 8. There is now due \$1143.53.

Interrogatory No. 10. Prior to your transactions with Central Auto Supply, Inc., did you or your company receive any communications or statements in writing from said Central Auto Supply, Inc., with reference to its financial condition?

If so, please describe each of such communica-

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Paul S. Godber.)

tions or statements, state how and when you received it, and hand it to the officer taking your deposition, to be marked as an exhibit to be attached to such deposition.

Answer to Interrogatory No. 10. We did not at any time prior to our transactions with Central Auto Supply, Inc., receive any communication or statement in writing from them with reference to their financial condition.

Interrogatory No. 11. At or before the time your merchandise was delivered to Central Auto Supply, Inc., were you, or your company, or any of its agents or officers advised that such merchandise when delivered was to be immediately delivered to Lawrence Warehouse Company and warehouse receipts issued therefor to Valley National Bank of Phoenix?

Answer to Interrogatory No. 11. At or before the time our merchandise was delivered to Central Auto Supply, Inc., we were certainly not advised by any of its agents or officers that such merchandise when received was to be immediately delivered to Lawrence Warehouse Company and warehouse receipts issued therefor to Valley National Bank of Phoenix or anyone else.

Interrogatory No. 12. If you, your company, or its officers or agents, had been so advised, would your company have sold and delivered such merchandise to Central Auto Supply, Inc.?

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Paul S. Godber.)

Answer to Interrogatory No. 12. If our company or any of our representatives had been so advised, no merchandise would have been shipped to Central Auto Supply, Inc., under such an arrangement.

Interrogatory No. 13. During the course of your dealings with Central Auto Supply, Inc., did you, or your company, receive any form letters, mimeographed balance sheets, or other communications from Mr. C. W. Saxon, Manager of said Central Auto Supply, Inc., or any other agent or officer thereof, apprising you or your company of the warehouse agreement between said Auto Supply and Lawrence Warehouse Company and the alleged lien of the Valley National Bank of Phoenix? If so, describe each of such communications, balance sheets or statements, state how and when each was received, and hand it to the officer taking your deposition, to be marked as an exhibit to be attached to this deposition.

Answer to Interrogatory No. 13. During the course of our dealings with Central Auto Supply, Inc., we did not receive any mimeographed balance sheets or form letters or other communications from Mr. C. W. Saxon, with the exception of the letter and report dated November 26, 1946, attached hereto as Exhibit "B" and with the exception of the letter dated December 26, 1946, attached hereto as Exhibit "C." These letters are referred to in

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Paul S. Godber.)

my answer to question No. 14. We received no communications regarding the Lawrence Warehouse Company or a lien of any kind held by the Valley National Bank of Phoenix.

Interrogatory No. 14. State in detail what arrangement, if any, your company had with Central Auto Supply, Inc., with reference to the sale and shipment of merchandise to said Central Auto Supply, Inc., during May, June and the 1st part of July, 1947, and with whom such arrangements, if any, were made.

Answer to Interrogatory No. 14. Prior to February, 1947, Central Auto Supply's account with our firm had become quite delinquent. In fact in December, 1946, they were placed on C.O.D. and we were told by Mr. Kersting that merchandise would be accepted on a C.O.D. basis and the balance of the old account would also be paid as fast as possible. Early in February of 1947, I visited Central Auto Supply Company, Inc., in Phoenix and by that time they had reduced their account with us to \$407.99. Mr. Kersting and Mr. Saxon both told me that they were in much better shape. They said they had received a letter of credit from the bank O.K.'ing them to operate on a current basis for any new bills incurred. They said that if we would again place them on open account they would guarantee that all bills would be paid on a current basis, and these new debts would have

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Paul S. Godber.)

nothing to do with their old indebtedness. On this assurance we placed them on open account and on April 10, 1947, they owed us only \$319.91, having made another payment against the old account. On April 10th, 1947, we made a new shipment to them which brought their balance as of June 3rd to \$1143.53. No payment was ever made against this amount. A statement confirming the above is attached marked Exhibit "A." Also attached hereto, marked Exhibit "B," is a letter we received from Central Auto Supply, dated November 26, 1946, which letter has attached to it a carbon copy of a report stated in the letter to have been made by the George S. May Company. This carbon copy of the report is dated November 14, 1946, and was received with the letter marked Exhibit "B." We had asked for a copy of the letter of credit referred to in this letter but did not receive it. On December 17th, 1946, we again asked for a copy of the letter of credit, but still did not receive it, but as above mentioned upon my visit to Central Auto Supply, Mr. Bob Kersting and Mr. Saxon told me that any new bills would be paid and their new bank arrangement would not in any way tie up money received for this new merchandise when sold by Central Auto Supply. Also attached and marked Exhibit "C" is a letter of December 26th, 1946, signed by Central Auto Supply, per C. W. Saxon, which we received through the mail and

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Paul S. Godber.)

which states that they have improved their financial condition considerably in the past 90 days and that the net worth has been increased by \$10,000.00.

/s/ PAUL S. GODBER.

[Endorsed]: Filed August 18, 1948.

PLAINTIFF'S EXHIBIT No. 5

Deposition of J. C. Baldwin

Interrogatory No. 1. State your name and address.

Answer to Interrogatory No. 1. J. C. Baldwin, 911 East Pine Street, Seattle, Washington.

Interrogatory No. 2. By whom are you employed?

Answer to Interrogatory No. 2. Standard Motor Products, Inc.

Interrogatory No. 3. State what office or position you hold in that company.

Answer to Interrogatory No. 3. Pacific Coast Manager.

Interrogatory No. 4. State how long you have been so employed by such company, the different offices or positions you have held while so employed, and the periods during which you have held each such office or position.

Answer to Interrogatory No. 4. Twenty-nine

Plaintiff's Exhibit No. 5—(Continued)

(Deposition of J. C. Baldwin.)

years consecutively and continuously in the same business, the same position.

Interrogatory No. 5. Describe briefly your duties.

Answer to Interrogatory No. 5. I am in charge of the company's affairs for eleven western states.

Interrogatory No. 6. Did your company sell any merchandise to Central Auto Supply, Inc., a corporation, of Phoenix, Arizona, prior to its adjudication as a bankrupt in July, 1947?

Answer to Interrogatory No. 6. They did.

Interrogatory No. 7. Of what did such merchandise consist?

Answer to Interrogatory No. 7. Automotive and electrical repair parts.

Interrogatory No. 8. Has your company been paid for such merchandise?

Answer to Interrogatory No. 8. No.

Interrogatory No. 9. If not, how much is now due?

Answer to Interrogatory No. 9. \$707.23.

Interrogatory No. 10. Prior to your transactions with Central Auto Supply, Inc., did you or did your company receive any communications or statements in writing from said Central Auto Supply, Inc., with reference to its financial condition?

If so, please describe each of such communications or statements, state how and when you received it, and hand it to the officer taking your

Plaintiff's Exhibit No. 5—(Continued)

(Deposition of J. C. Baldwin.)

deposition, to be marked as an exhibit to be attached to such deposition.

Answer to Interrogatory No. 10. None.

Interrogatory No. 11. At or before the time your merchandise was delivered to Central Auto Supply, Inc., were you, or your company, or any of its agents or officers advised that such merchandise when delivered was to be immediately delivered to Lawrence Warehouse Company and warehouse receipts issued therefor to Valley National Bank of Phoenix?

Answer to Interrogatory No. 11. No. We sold it on a regular open account.

Interrogatory No. 12. If you, your company, or its officers or agents, had been so advised, would your company have sold and delivered such merchandise to Central Auto Supply, Inc.?

Answer to Interrogatory No. 12. Certainly not.

Interrogatory No. 13. During the course of your dealings with Central Auto Supply, Inc., did you, or your company, receive any form letters, mimeographed balance sheets, or other communications from Mr. C. W. Saxon, Manager of said Central Auto Supply, Inc., or any other agent or officer thereof, apprising you or your company of the warehouse agreement between said Auto Supply and Lawrence Warehouse Company and the alleged lien of the Valley National Bank of Phoenix?

If so, describe each of such communications,

Plaintiff's Exhibit No. 5—(Continued)

(Deposition of J. C. Baldwin.)

balance sheets or statements, state how and when each was received, and hand it to the officer taking your deposition, to be marked as an exhibit to be attached to this deposition.

Answer to Interrogatory No. 13. No. We did receive a letter dated June 26, 1947, signed by C. W. Saxon, setting forth the involvement of their company and to which was attached their balance sheet dated June 20, 1947, in which they asked all creditors to accept monthly payments of 2 per cent of the total owed or settle all outstanding bills at once on the basis of 25 per cent of total owed. However, according to our records, this letter was not received until after the merchandise amounting to \$707.23 had been shipped to them in Phoenix. In fact, we knew nothing of the condition of this company other than that they had previously paid their bills with us until we got this letter, and, as I said before, the merchandise had been shipped.

(Letter from Central Auto Supply, Phoenix, Arizona, dated June 26, 1947, marked Plaintiff's 1 for identification, same being returned herewith and attached hereto.)

(Concluded)

/s/ J. C. BALDWIN.

[Endorsed]: Filed August 21, 1948.

PLAINTIFF'S EXHIBIT No. 6

Deposition of Edward R. Tolfree

Interrogatory No. 1. State your name and address.

Interrogatory No. 2. By whom are you employed?

Interrogatory No. 3. State what office or position you hold in that company.

Interrogatory No. 4. State how long you have been so employed by such Company, the different offices or positions you have held while so employed, and the periods during which you have held each such office or position.

Interrogatory No. 5. Describe briefly your duties.

Interrogatory No. 6. Did your company sell any merchandise to Central Auto Supply, Inc., a corporation, of Phoenix, Arizona, prior to its adjudication as a bankrupt in July, 1947.

Interrogatory No. 7. Of what did such merchandise consist?

Interrogatory No. 8. Has your company been paid for such merchandise?

Interrogatory No. 9. If not, how much is now due?

Interrogatory No. 10. Prior to your transactions with Central Auto Supply, Inc., did you or your company receive any communications or statements in writing from said Central Auto Supply, Inc., with reference to its financial condition?

If so, please describe each of such communica-

Plaintiff's Exhibit No. 6—(Continued)

(Deposition of Edward R. Tolfree.)

tions or statements, state how and when you received it, and hand it to the officer taking your deposition, to be marked as an exhibit to be attached to such deposition.

Interrogatory No. 11. At or before the time your merchandise was delivered to Central Auto Supply, Inc., were you, or your company, or any of its agents or officers advised that such merchandise when delivered was to be immediately delivered to Lawrence Warehouse Company and warehouse receipts issued therefor to Valley National Bank of Phoenix?

Interrogatory No. 12. If you, your company, or its officers or agents, had been so advised, would your company have sold and delivered such merchandise to Central Auto Supply, Inc.?

Interrogatory No. 13. During the course of your dealings with Central Auto Supply, Inc., did you, or your company, receive any form letters, mimeographed balance sheets, or other communications from Mr. C. W. Saxon, Manager of said Central Auto Supply, Inc., or any other agent or officer thereof, apprising you or your company of the warehouse agreement between said Auto Supply and Lawrence Warehouse Company and the alleged lien of the Valley National Bank of Phoenix? If so, describe each of such communications, balance sheets or statements, state how and when each was received, and hand it to the officer taking your depo-

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Edward R. Tolfree.)

sition, to be marked as an exhibit to be attached to this deposition.

Answer to Interrogatory No. 1. Edward R. Tolfree—Business address, 25 W. 45th Street, New York City; residence, 400 East 49th Street, New York City.

Answer to Interrogatory No. 2. "X" Laboratories, Inc.

Answer to Interrogatory No. 3. President.

Answer to Interrogatory No. 4. Since we incorporated, before I owned the company and originated it. We incorporated in 1934. I have always been the President since the inception of the corporation.

Answer to Interrogatory No. 5. I supervised sales and finance.

Answer to Interrogatory No. 6. Yes.

Answer to Interrogatory No. 7. We sold this concern 300 assorted cartons of our products—"x" liquid, "x" superflush, "x" block liquid, "x" rust-off, "x" alkaline flush, "x" powder and "x" car wash.

Answer to Interrogatory No. 8. No.

Answer to Interrogatory No. 9. \$2379.72.

Answer to Interrogatory No. 10. No.

Answer to Interrogatory No. 11. No.

Answer to Interrogatory No. 12. No.

Answer to Interrogatory No. 13. No.

/s/ EDWARD R. TOLFREE.

[Endorsed]: Filed September 14, 1948.

PLAINTIFF'S EXHIBIT No. 7

Deposition of Frank A. Warburton, Jr.

Interrogatory No. 1: State your name and address.

Answer: Frank A. Warburton, Jr., 1761 London Road, Cleveland 12, Ohio.

Interrogatory No. 2: By whom are you employed?

Answer: Doan Manufacturing Corporation.

Interrogatory No. 3: State what office or position you hold in that company.

Answer: Office manager and credit manager.

Interrogatory No. 4: State how long you have been so employed by such company, the different offices or positions you have held while so employed, and the periods during which you have held each such office or position.

Answer: I have been employed by Doan Manufacturing Corporation approximately two and a half years, during which time I have held the position as office manager and credit manager.

Interrogatory No. 5: Describe briefly your duties.

Answer: Duties consist of supervising all office personnel, handling accounts receivable, accounts payable, collections, and any other detailed duties which occur.

Interrogatory No. 6: Did your company sell any merchandise to Central Auto Supply, Inc., a corporation, of Phoenix, Arizona, prior to its adjudication as a bankrupt in July, 1947?

Plaintiff's Exhibit No. 7—(Continued)
(Deposition of Frank A. Warburton, Jr.)

Answer: We have had one sale to Central Auto Parts of Phoenix, Arizona, which was made on August 27, 1946.

Interrogatory No. 7: Of what did such merchandise consist?

Answer: This sale consisted solely of automotive floor mats, thirty-six of one style and forty-two of another, a total cost of \$143.77, less freight allowance, terms two per cent, tenth prox., thirty days net.

Interrogatory No. 8: Has your company been paid for such merchandise?

Answer: They have received partial payment on this shipment for the amount of \$43.77, received on April 29, 1947.

Interrogatory No. 10: Prior to your transaction with Central Auto Supply, Inc., did you or your company receive any communications or statements in writing from said Central Auto Supply, Inc., with reference to its financial condition?

If so, please describe each of such communications or statements, state how and when you received it, and hand it to the officer taking your deposition, to be marked as an exhibit to be attached to such deposition. Answer: No.

Interrogatory No. 11: At or before the time your merchandise was delivered to Central Auto Supply, Inc., were you, or your company, or any of its agents or officers advised that such merchandise when de-

Plaintiff's Exhibit No. 7—(Continued)

(Deposition of Frank A. Warburton, Jr.)

livered was to be immediately delivered to Lawrence Warehouse Company and warehouse receipts issued therefor to Valley National Bank of Phoenix?

Answer: No.

Interrogatory No. 12: If you, or your company, or its officers or agents, had been so advised, would your company have sold and delivered such merchandise to Central Auto Supply, Inc.?

Answer: No, we would not.

Interrogatory No. 13: During the course of your dealings with Central Auto Supply, Inc., did you or your company receive any form letters, mimeographed balance sheets, or other communications from Mr. C. W. Saxon, Manager of said Central Auto Supply, Inc., or any other agent or officer thereof, apprising you or your company of the warehouse agreement between said Auto Supply and Lawrence Warehouse Company and the alleged lien of the Valley National Bank of Phoenix? If so, describe each of such communications, balance sheets or statements, state how and when each was received, and hand it to the officer taking your deposition, to be marked as an exhibit to be attached to this deposition.

Answer: No, we did not receive any.

/s/ FRANK A. Warburton, Jr.

[Endorsed]: Filed September 16, 1948.

PLAINTIFF'S EXHIBIT No. 8

Deposition of M. Blackburn

Interrogatory No. 1. State your name and address.

Answer to Interrogatory No. 1. Maurine Blackburn, Fairfield, Illinois.

Interrogatory No. 2. By whom are you employed?

Answer to Interrogatory No. 2. Chefford Master Manufacturing Co., Inc.

Interrogatory No. 3. State what office or position you hold in that Company.

Answer to Interrogatory No. 3. Credit Manager.

Interrogatory No. 4. State how long you have been so employed by such Company, the different offices or positions you have held while so employed, and the periods during which you have held each such office or position.

Answer to Interrogatory No. 4. I have been employed by Chefford Master Manufacturing Co., Inc., continuously for the last thirteen years. I started as order clerk, typist, inventory clerk. I have had my present position approximately five years.

Interrogatory No. 5. Describe briefly your duties.

Answer to Interrogatory No. 5. Approval of credit orders and collection of accounts.

Interrogatory No. 6. Did your Company sell any merchandise to Central Auto Supply, Inc., a Corporation, of Phoenix, Arizona, prior to its adjudication as a bankrupt in July, 1947?

Answer to Interrogatory No. 6. Yes.

Plaintiff's Exhibit No. 8—(Continued)
(Deposition of M. Blackburn.)

Interrogatory No. 7. Of what did such merchandise consist?

Answer to Interrogatory No. 7. Automobile parts for replacement.

Interrogatory No. 8. Has your Company been paid for such merchandise?

Answer to Interrogatory No. 8. No.

Interrogatory No. 9. If not, how much is now due?

Answer to Interrogatory No. 9. \$282.64.

Interrogatory No. 10. Prior to your transactions with Central Auto Supply, Inc., did you or your company receive any communications or statements in writing from said Central Auto Supply, Inc., with reference to its financial condition? If so, please describe each of such communications or statements, state how and when you received it, and hand it to the officer taking your deposition, to be marked as an exhibit to be attached to such deposition.

Answer to Interrogatory No. 10. None at all.

Interrogatory No. 11. At or before the time your merchandise was delivered to Central Auto Supply, Inc., were you, or your company, or any of its agents or officers advised that such merchandise when delivered was to be immediately delivered to Lawrence Warehouse Company and warehouse receipts issued therefor to Valley National Bank of Phoenix?

Plaintiff's Exhibit No. 8—(Continued)
(Deposition of M. Blackburn.)

Answer to Interrogatory No. 11. No, sir.

Interrogatory No. 12. If you, your company, or its officers or agents, had been so advised, would your company have sold and delivered such merchandise to Central Auto Supply, Inc.?

Answer to Interrogatory No. 12. We would not.

Interrogatory No. 13. During the course of your dealings with Central Auto Supply, Inc., did you, or your company, receive any form letters, mimeographed balance sheets, or other communications from Mr. C. W. Saxon, Manager of said Central Auto Supply, Inc., or any other agent or officer thereof, apprising you or your company of the warehouse agreement between said Auto Supply and Lawrence Warehouse Company and the alleged lien of the Valley National Bank of Phoenix?

If so, describe each of such communications, balance sheets or statements, state how and when each was received, and hand it to the officer taking your deposition, to be marked as an exhibit to be attached to this deposition.

Answer to Interrogatory No. 13. The only thing that we received pertaining to the financial condition of Central Auto Supply, Inc., was a letter dated June 26, 1947, which was twenty-four days after the last shipment of merchandise to the Central Auto Supply, Inc., which letter had attached to it a purported financial statement. This letter was received by mail and it is in the same condition now as when received, with the exception of the pencil

Plaintiff's Exhibit No. 8—(Continued)

(Deposition of M. Blackburn.)

notations on the first page, which are in my handwriting and were my office memoranda.

I will hand you this letter, consisting of two pages, with the financial statement attached. The exhibit which you have just marked A-1 is the first page of said letter; the exhibit which you have just marked A-2 is the second page of said letter, and the exhibit which you have just marked A-3 is the financial statement attached to said letter.

/s/ M. BLACKBURN.

/s/ (MAURINE BLACKBURN.)

[Endorsed]: Filed September 21, 1948.

PLAINTIFF'S EXHIBIT No. 9

Deposition of David Shapiro

Interrogatory No. 1. State your name and address?

Answer to Interrogatory No. 1. David Shapiro, 1252 North Damen Avenue, Chicago.

Interrogatory No. 2. By whom are you employed?

Answer to Interrogatory No. 2. Everhot Products Co., 2001 West Carroll Avenue.

Interrogatory No. 3. State what office or position you hold in that company?

Answer to Interrogatory No. 3. Assistant book-keeper.

Plaintiff's Exhibit No. 9—(Continued)
(Deposition of David Shapiro.)

Interrogatory No. 4. State how long you have been so employed by such company, the different offices or position you have held while so employed, and the periods during which you have held each such office or position?

Answer to Interrogatory No. 4. I have been employed eleven months in the same position.

Interrogatory No. 5. Describe briefly your duties?

Answer to Interrogatory No. 5. Posting to accounts receivable and checking credits.

Interrogatory No. 6. Did your company sell any merchandise to Central Auto Supply, Inc., a corporation, of Phoenix, Arizona, prior to its adjudication as a bankrupt in July, 1947?

Answer to Interrogatory No. 6. Yes.

Interrogatory No. 7. Of what did such merchandise consist?

Answer to Interrogatory No. 7. Automotive parts.

Interrogatory No. 8. Has your company been paid for such merchandise?

Answer to Interrogatory No. 8. No.

Interrogatory No. 9. If not, how much is now due?

Answer to Interrogatory No. 9. \$81.31.

Interrogatory No. 10. Prior to your transactions with Central Auto Supply, Inc., did you or your company receive any communications or statements

Plaintiff's Exhibit No. 9—(Continued)

(Deposition of David Shapiro.)

in writing from said Central Auto Supply, Inc., with reference to its financial condition?

Answer to Interrogatory No. 10. No.

Interrogatory No. 11. At or before the time your merchandise was delivered to Central Auto Supply, Inc., were you or your company, or any of its agents or officers advised that such merchandise when delivered was to be immediately delivered to Lawrence Warehouse Company and warehouse receipts issued therefor to Valley National Bank of Phoenix?

Answer to Interrogatory No. 11. No.

Interrogatory No. 12. If you, your company or its officers or agents had been so advised, would your company have sold and delivered such merchandise to Central Auto Supply, Inc.?

Answer to Interrogatory No. 12. No.

Interrogatory No. 13. During the course of your dealings with Central Auto Supply, Inc., did you or your company, receive any form letters, mimeographed balance sheets, or other communications from Mr. C. W. Saxon, Manager of said Central Auto Supply, Inc., or any other agent or officer thereof, apprising you or your company of the warehouse agreement between said Auto Supply and Lawrence Warehouse Company and the alleged lien of the Valley National Bank of Phoenix?

Answer to Interrogatory No. 13. No.

/s/ DAVID SHAPIRO.

[Endorsed]: Filed September 21, 1948.

PLAINTIFF'S EXHIBIT No. 10

Deposition of F. C. Westphal

Interrogatory No. 1: State your name and address.

Answer to Interrogatory No. 1: F. C. Westphal; 617 Meadow Lane, Libertyville, Illinois.

Interrogatory No. 2: By whom are you employed?

Answer to Interrogatory No. 2: By Ammco Tools, Inc.

Interrogatory No. 3: State what office or position you hold in that company?

Answer to Interrogatory No. 3: Treasurer.

Interrogatory No. 4: State how long you have been so employed by such company, the different offices or positions you have held while so employed, and the periods during which you have held each such office or position?

Answer to Interrogatory No. 4: I have been employed for fifteen years with Ammco Tools, Inc. They were formerly known as Automotive Maintenance Machinery Co. They changed their name in October of 1946. I held the office of credit manager for five years, and the balance of over ten years as treasurer.

Interrogatory No. 5: Describe briefly your duties?

Answer to Interrogatory No. 5: My duties are in general financial affairs of the company; also I have charge of all accounting procedure.

Plaintiff's Exhibit No. 10—(Continued)
(Deposition of F. C. Westphal.)

Interrogatory No. 6: Did your company sell any merchandise to Central Auto Supply, Inc., a corporation, of Phoenix, Arizona, prior to its adjudication as a bankrupt in July, 1947?

Answer to Interrogatory No. 6: Yes, sir, we did.

Interrogatory No. 7: Of what did such merchandise consist?

Answer to Interrogatory No. 7: One L-42 five-foot Universal Line Boring Machine. That is the only item we have ever sold them.

Interrogatory No. 8: Has your company been paid for such merchandise?

Answer to Interrogatory No. 8: No, we have not.

Interrogatory No. 9: If not, how much is now due?

Answer to Interrogatory No. 9: \$103.82.

Interrogatory No. 10: Prior to your transactions with Central Auto Supply, Inc., did you or your company receive any communications or statements in writing from said Central Auto Supply, Inc., with reference to its financial condition?

Answer to Interrogatory No. 10: No.

Interrogatory No. 11: At or before the time your merchandise was delivered to Central Auto Supply, Inc., were you, or your company, or any of its agents or officers advised that such merchandise when delivered was to be immediately delivered to Lawrence Warehouse Company and warehouse re-

Plaintiff's Exhibit No. 10—(Continued)
(Deposition of F. C. Westphal.)

ceipts issued therefor to Valley National Bank of Phoenix?

Answer to Interrogatory No. 11: No.

Interrogatory No. 12: If you, your company, or its officers or agents, had been so advised, would your company have sold and delivered such merchandise to Central Auto Supply, Inc.?

Answer to Interrogatory No. 12: No, not on that basis.

Interrogatory No. 13: During the course of your dealings with Central Auto Supply, Inc., did you, or your company, receive any form letters, mimeographed balance sheets, or other communications from Mr. C. W. Saxon, Manager of said Central Auto Supply, Inc., or any other agent or officer thereof, apprising you or your company of the warehouse agreement between said Auto Supply and Lawrence Warehouse Company and the alleged lien of the Valley National Bank of Phoenix?

Answer to Interrogatory No. 13: No, we have not. We have never had any notifications or correspondence.

/s/ F. C. WESTPHAL.

[Endorsed]: Filed September 21, 1948.

Mr. Perry: The plaintiff rests.

DEFENDANTS' CASE

Mr. Craig: If the Court please, at this time we would like to make a motion for judgment at the close of the plaintiff's case, upon the grounds that the plaintiff has failed to prove the allegations of its complaint, specifically, that the plaintiff has failed to prove that there was any lack of possession of the inventories in question of the Lawrence Warehouse Company, that there wasn't anything in this transaction in violation of the Uniform Warehouse Receipts Act or the Statute referred to in plaintiff's complaint as Section 62-522. The Court will notice that the gravamen of the plaintiff's complaint is set forth in Paragraphs 3 and 4 of the complaint, that plaintiff has wholly failed to prove the allegations therein contained.

The Court: Very well, the motion will be denied.

Mr. Craig: At this time, if the Court please, we would like to offer the deposition of C. W. Saxon in evidence.

The Court: Any objection?

Mr. Perry: Yes, if your Honor please, the proper foundation has not been laid for it, and the deposition was taken here. I don't think there is any showing that the man is not available and could not testify here.

Mr. Craig: Well, will you stipulate, Mr. Perry, that the deposition was taken on December 1st, 1947, and that Mr. Saxon is in Los Angeles, California.

Mr. Perry: Is that a fact?

Mr. Craig: Yes.

Mr. Perry: Withdraw our objection, put it in.

The Court: It may be received, then.

(Thereupon the document was marked as Defendant's Exhibit D in evidence.)

Mr. Craig: Mr. Mitchell.

HAROLD A. MITCHELL

was called as a witness on behalf of the defendants, and being first duly sworn, testified as follows: [42]

Direct Examination

By Mr. Craig:

Q. Will you state your name, please, Mr. Mitchell? A. Harold A. Mitchell.

Q. Where do you reside, Mr. Mitchell?

A. 6 South 27th Avenue, Phoenix.

Q. Where are you employed?

A. By the Lawrence Warehouse Company operating as District Manager of the Phoenix territory and subject to the supervision of the Los Angeles office.

Q. How long have you been employed by the Lawrence Warehouse Company, Mr. Mitchell?

A. Well, since '35, as a regular employee.

Q. And in what capacities have you been employed?

A. I have been employed in the capacity of a Warehouse examiner, whose duty is to install these field warehouse set-ups, and as my present position of District Manager, supervising the examiners that

(Testimony of Harold A. Mitchell.)

are in the field, making regular examinations and installations.

Q. And were you employed by the Lawrence Warehouse Company at the time the arrangement was made with the Central Auto Supply in Phoenix, Arizona? A. Yes. [43]

Q. In '46 and '47, along in that period?

A. Yes, I was. In fact, I drew up the contract which was of course forwarded to my Los Angeles office for approval. That was on July 26th, 1946.

Q. In other words, you negotiated the contract between—— A. The Central Auto.

Q. The Central Auto and the Lawrence Warehouse Company and the Valley National Bank?

A. Yes, sir.

Q. On behalf of the Lawrence Warehouse Company? A. That is right.

Q. Now, Mr. Mitchell, will you explain to the Court just what this particular financing arrangement was, when it began with the Central Auto Supply Company, what transpired during the period it was in existence, and when it was terminated, if you know.

A. The contract was entered into on July 26, 1946, approval was received approximately the 30th of that month. Installation was immediately began as the account was in somewhat of a hurry for their financial set-up on the Valley National Bank. In the process of the installation, a lease was secured from the Central Auto Supply Company,

(Testimony of Harold A. Mitchell.)

which was then operating as a partnership. [44]

Q. At what location?

A. At 601 Adams. After the lease had been completed, the present warehouse agreement completed between the Bank, Central Auto Supply and the Lawrence Warehouse Company, partitions were built where they were necessary and locked off and segregated the commodity from other commodities from the general operation of the Central Auto Supply, and separating the commodities from, you might say, the main portion of the building used as display purposes and where customers had access to.

As soon as these partitions were finished, and in that respect I mean constructed and erected, we placed our signs on all the main entrances and inside the building where they could be seen from any reasonable position in the building, and employees were hired. At the time of the installation, I believe we hired five men, a warehouse manager, three assistants, and a bonded clerk. The duties of these men were simply this: The Warehouse Manager supervised the work of the assistants and the bonded clerk. The Warehouse Manager was responsible for receiving and delivering, and primarily responsible to seeing that the records were kept as his instructions were outlined to him. [45] Those instructions are contained in a regular book form. Inventory was taken after the warehouse manager and employees had been instructed to what we

(Testimony of Harold A. Mitchell.)

thought thoroughly enough. Inventory was taken and a warehouse receipt issued for the entire inventory. At that time, I think the inventory amounted to approximately \$36,000. That inventory was taken to the Bank in the company, I believe, of two of the partners, and the financial arrangements completed at the Bank.

At that time the Lawrence Warehouse Company received delivery instructions from the Bank allowing the Lawrence Warehouse Company to deliver to Central Auto & Supply Company \$5000 worth of merchandise at any one time, meaning that we could deliver \$5000 without a direct order for warehouse release, and when we reached the Five, we cut off the deliveries until settlement was made at the Bank for the \$5000 withdrawn. It didn't limit them to Five in one week. They could release 15 times or \$15,000 a week if they settled three times during the week. However, if they only delivered a hundred dollars during the week, they had to settle during the week for the hundred. That is elementary, the starting of the operation.

We had a man at the counter, a bonded man at [46] the counter, and an assistant. We had a warehouse manager, of course, in the back. We had a bonded man who withdrew the merchandise for the shop. We had an assistant who withdrew merchandise for what they called the carburetor department, and a bonded clerk. The bonded clerk's duties were to assimilate all the papers transmitted by the assistant and the warehouse manager during

(Testimony of Harold A. Mitchell.)

the day, and compiling them and recapping at the end of the day. That recap showed exactly the number of units and the dollar and cents value of the merchandise withdrawn during that day. That total figure was posted against our authority given to us by the Bank allowing us to deliver \$5000. That is the way we determined whether we were under the \$5000, or nearing that amount. That operation continued for some time along that line. About December of '47, I believe, November or December, the Central Auto Supply Company hired the services of the George S. May Company, industrial engineers, and in their appraisal of the business, very little of our operations changed, but the only thing that was changed was the withdrawing of several documents, or rather invoices that had no concern with our operations.

I think they dismissed a couple of counter men; in fact, we had a little discussion as to our employees who were all left intact at that time. That went on until December, I believe, when Mr. Saxon, of the George S. May Company, left the company and came with the Central Auto Supply Company as General Manager. During this time, however, our delivering instructions were changed from 5000 to 2000, and around in February, I believe, the Bank cancelled them altogether. We had to get a direct order for release before the merchandise could be removed out of the warehouse.

Q. February of what year?

(Testimony of Harold A. Mitchell.)

A. It was February of 1948, and January. That didn't last long, however. The delivery instructions were reinstated to 500. Now, on July 21st we received notice of bankruptcy, and the warehouse was locked. We immediately, under the supervision of the warehouse manager, took inventory. That took us until the 12th of August to take the inventory and price and extend it.

Q. Now, that was the 12th of August of what year? A. '47, or '48, rather.

Q. Well, when did this thing get started, Mr. Mitchell, do you remember?

A. July 26th or 30th, 1946.

Q. '46, and it went through '46? [48]

A. About July 21st, that first notice of bankruptcy, in '47. We vacated the property or our warehouse, removed our signs after securing a release for the commodities from the Bank on or about November 12th, I would say.

Q. Of '47? A. Of '47.

Q. I asked you that because on a couple of occasions here you said '48. I wanted——

A. Well, '47.

Q. '47. Proceed, Mr. Mitchell.

A. The actual records pertaining to the movement of commodities consisted of invoices made up by the various employees. Very seldom had we put our account or go to the expense of having special invoices pertaining to that particular business printed up. We used on this specific occasion, we

(Testimony of Harold A. Mitchell.)

were granted permission to use the regular form of invoices that the account was then using, with one exception, that we had a fourth copy inserted. Those copies, the original, I imagine, went to the—the original and duplicate, I imagine, went to their office. However, the triplicate and the fourth copy went to our warehouse manager who, in turn, turned them over to the bonded bookkeeper to post in perpetual card records. The third copy, [49] one of the employees of the account priced and extended. I believe that is about all.

Q. Now, can you explain your relationship with the Valley National Bank throughout this transaction? What negotiations or what steps did you take with the Bank during the course of these operations?

A. Well, as field warehousemen, we are a separate, independent entity storing goods for others for a charge, neutral custodian or trustee for collateral, so that we had to report to the Bank once a week, at least once a week, more often if necessary, as to the amount of goods in dollars and cents and the number of units of merchandise withdrawn. We also, of course, reported on a warehouse receipt form which is used as a pledge for the collateral on what was actually received in the warehouse during the week, however, if the Bank refused to sign our confirmation for delivery of commodities delivered from the warehouse during the week, we, naturally, were not authorized to deliver another dollar out of

(Testimony of Harold A. Mitchell.)

the warehouse until a copy of the release was signed and returned to the warehouse manager. We were at the Bank constantly on this particular operation, due to the fact of the financial condition, the change in [50] delivery instructions. I believe our documents were modified on March 17th, 1947, to conform to the new designated area and reducing the area. Not only that, but we had been notified on February 20th that the Company incorporated February 20th, 1947, that the Company had incorporated, which naturally meant that we should change the documents covering the contract and lease. That, of course, kept us constantly in touch with the bank.

Q. Will you state if you know, Mr. Mitchell, whether the warehouse receipts that were issued on these commodities were negotiable or non-negotiable warehouse receipts?

A. They were non-negotiable warehouse receipts made out to the Valley National Bank.

Q. Now, Mr. Mitchell, I show you a set of photographs marked Defendant's Lawrence Warehouse Exhibit No. A for identification, and ask you if those photographs truly depict the posting of your signs on the premises at 601 East Adams Street where the Central Auto Supply Company operated.

A. Yes, they do.

Mr. Craig: We offer the photographs in evidence.

Mr. Perry: We have no objection.

(Testimony of Harold A. Mitchell.)

(Thereupon the documents were received as Defendant Lawrence Warehouse Company's Exhibit A [51] in evidence.)

Q. (By Mr. Craig): Now, Mr. Mitchell, I will refer to Plaintiff's Exhibit No. 1 in evidence, and I call your attention to the blueprint attached to the first instrument entitled "Lawrence Warehouse Company Field Warehouse Lease," dated March 17th, 1947, which blueprint is marked Exhibit A, and ask you to explain the significance of the red line on that blue print.

A. Well, a copy of this blueprint is posted at the main entrance of the warehouse. This instrument or this blueprint states on the top: "All of the space as shown outlined in red on this diagram is leased to Lawrence Warehouse Company, warehousemen, and is being operated as Phoenix, Arizona, Warehouse No. 21." Portions of that red line were fenced and others being behind solid walls, and all commodities that were pledged to the Bank and the Lawrence Warehouse receipts were kept within that area until delivered.

Q. Now, Mr. Mitchell, does the Warehouse Company's Exhibit A in evidence, I will ask you to state whether or not those signs which appear in those photographs as notices over the name of the Lawrence Warehouse Company were the signs which were posted on the premises? [52]

A. Yes, sir.

(Testimony of Harold A. Mitchell.)

Q. And I call your attention to the photograph depicting the fences in front of apparently the hallways or the walkways through the stacks of commodities, and ask you if those fences as depicted are the fences which you had placed upon those premises?

A. Those are the fences that required the account to construct before we issued our first warehouse receipts.

Q. Now, I call your attention to the photograph which apparently discloses the interior and the front counter of the store building, and direct your attention to the right hand side of the photograph which depicts apparently a gate, upon which there is a hasp and padlock, and ask you who the hasp and padlock belonged to?

A. Those are the Lawrence Warehouse Company's padlocks, the name imprinted on them, and while this picture does not show the rest of the gates, they are all alike.

Q. They are all alike, and who has the key to those padlocks?

A. Those keys, I might have failed to mention in summarizing the operation and describing the operation, the keys, complete padlock were given to the bonded employees who had sole possession and kept those keys in their possession at all times and not allowed to——

Q. Bonded employees of whom?

A. The Lawrence Warehouse Company. They

(Testimony of Harold A. Mitchell.)

were not allowed to even pass them back and forth between the employees.

Q. Did at any time, Mr. Kersting or any of the other officers or persons in charge, or employees of the Central Auto Supply, whether it was a partnership or a corporation, have keys which would allow them to enter the premises of which you speak? A. No, sir.

Q. Do you know whether or not at the conclusion of this operation, Mr. Mitchell, all locks and keys were accounted for to the Lawrence Warehouse Company by the employees of the Lawrence Warehouse Company?

A. Yes, sir. At the time each man is discharged or relieved of his duties, the examiner who is making the change or dismantling the warehouse, must account for all of the keys and locks at that time. In this instance, however, when the dismantling of the warehouse was performed by the Lawrence Warehouse Company, our signs removed, [54] blueprint, stock cards, showing what commodities were held for the Valley National Bank which were all posted throughout the warehouse, we had to leave the locks on for a period of a short time for the courtesy of the Bank, who had no locks.

Q. What do you mean, Mr. Mitchell, when you refer to bonded employees, such as your bonded clerks?

A. Well, these employees are on the payroll of the Lawrence Warehouse Company. They are paid

(Testimony of Harold A. Mitchell.)

according to their employment agreement signed at the time of employing them for a stipulated salary. They are bonded by Lloyds of London, \$500,000 fidelity bond. Does that answer your question?

Q. Yes. With reference to the employment agreements with employees, Mr. Mitchell, state whether or not this was in writing, and if so, who signs them and if not, how they are arranged?

A. The employment agreement is in a type-written form. The contract stipulates the salary which is agreed upon between the Lawrence Warehouse Company and the employee. It, in one sense, reminds him of his responsibility as to his duties, signed by the Lawrence Warehouse Company, Warehouse Examiner or representative, and, of course, it is forwarded to the operating office which in this [55] case, is the Los Angeles office.

Q. Does the depositor, as in this case the Central Auto Supply Company, have anything to do with the employment of the Lawrence Warehouse Company, on any given individual?

A. No, sir. In this particular instance, we, at the beginning of our operation, did select the employees who had formerly worked for the account. We did this for one specific purpose. These boys knew the inventory from the front to the back door. We, of course, screen them, pick, you might say, the more intelligent ones, those that were actually handling the merchandise and in a position to know the requirements and, of course, they were

(Testimony of Harold A. Mitchell.)

taken off of our account's payroll and placed on our payroll.

Q. Now, is that customary throughout your operations or throughout the operations of the Lawrence Warehouse Company throughout the United States?

A. That is customary throughout the United States. There are some exceptions as was in this case. When, I forget, I believe it was in October of '47, or November.

Q. '46?

A. '46, rather, that some of our employees left for better positions, but I had to go out and pull in other employees that I had in other warehouses to fill those positions.

Q. State, Mr. Mitchell, the method of paying your employees. Did you pay them directly or did the Lawrence Warehouse Company pay them directly, or did they wait for advice from the depositor or anybody else with respect to the payment of their salary claims?

A. No, no, these checks to our employees came directly from our payroll department in our Los Angeles office, and checks in check form, of course, addressed to the employees as to their title. These checks were usually sent in care of the warehouse manager to distribute them to the various store employees, assistants or the bonded clerks.

Q. Now, Mr. Mitchell, with respect to these salary checks, all the accounting procedure necessary

(Testimony of Harold A. Mitchell.)

in the presentation of those checks with respect to the withholding taxes and unemployment insurance and everything of that nature, was done by the Lawrence Warehouse Company, was it?

A. Oh, yes, the payroll department in the Los Angeles office makes the deductions or withholding, security, old age, makes all deductions that is [57] necessary on the regular form of payroll check.

Q. Now, Mr. Mitchell, you were here in Phoenix throughout the term of this operation, were you?

A. Yes, sir. There were several times when I was on the road covering other warehouses located in different parts of the State, New Mexico, and Texas, which is the territory covered.

Q. Did you maintain your position in a supervisory capacity over this operation throughout that period?

A. In two senses: When the operation was begun I was Warehouse Examiner at the time, and of course, at the beginning of any operation we have to continually call on the warehouse, review instructions to employees, and I imagine I was down there two or three times a week for the first six or seven weeks, and then our program is often changed a bit, we hire more examiners and when we did this, I went strictly in the supervisory capacity.

Q. Mr. Mitchell, from your experience with this operation and your knowledge of the operation,

(Testimony of Harold A. Mitchell.)

do you know of any time during the period of this arrangement when any person of the Central Auto Supply Company or the Valley National Bank, or any other person was allowed within the warehouse area without first securing the consent of the Lawrence [58] Warehouse Company and without having a representative of the Lawrence Warehouse Company present at the time?

A. No, sir. They requested it several times, Mr. Saxon did. But the main purpose and request were merely to cut down expenses, not realizing that our position was one of daily for hire, and as soon as he was informed what our rules and regulations called for, he conformed to them in their entirety.

Q. Did you ever stop deliveries or prevent withdrawals of merchandise from that establishment?

A. Yes, we did. That was towards the end of the operation. The exact date of that one time I don't remember. It seems to me it was in February.

Q. What were the nature of those——

A. Well, we had reached the limit set forth by the Valley National Bank of the amount of the commodities that could be delivered at any one time before settlement was made at the bank. There was one occasion that we stopped all deliveries. There was another occasion in which we submitted our confirmation delivery or record of what had been taken out of the warehouse during the week which the Bank refused to sign, we learned, be-

(Testimony of Harold A. Mitchell.)

cause the account did not make payment. This was [59] reinstated later. I believe that happened on a weekend. It was reinstated the following morning by the Bank after making their arrangements with the account to pay.

Q. Mr. Mitchell, did you, in the course of this operation, ever have to recapture merchandise which you believed to have been improperly withdrawn from this warehouse?

A. Yes, sir, there was a time when the Seal Power representative, Mr. Fred Brown, took some merchandise out of the warehouse; in fact, had it at the loading dock of the truck line, the shipping concern, when myself and the warehouse manager had to go to the shipping dock and tell them that they were handling hot merchandise, which was returned immediately, put back in stock. I don't know what was behind that deal, but it seems to me that Freddie Brown had a claim of some sort.

Q. Did you ever lock the premises up or advise the Central Auto Company that you would close them up or close the warehouse with respect to subsequent deliveries for failure to pay charges due to the agreement entered into between Lawrence and Central?

A. That has happened several times when our charges got up to where they endangered the margin of security held by the Bank and where it rose to [60] a figure that just didn't warrant our carrying on unless they were paid in full. That hap-

(Testimony of Harold A. Mitchell.)

pened several times, and if my memory serves me correctly, we were paid before we did take any desperate, or any position of locking the doors entirely.

Q. Did the Valley National Bank ever pay your charges in order to prevent the stopping of the operation over there?

A. Toward the last part of the operation, when it was clear that the Central Auto Supply could not meet their charges and their payments of the charges according to our contract, the Valley National Bank did step in and take care of them.

Mr. Craig: You may cross-examine.

Cross-Examination

By Mr. Perry:

Q. Mr. Mitchell, I notice in your testimony you referred a number of times to "the account." You said, "I required the account to build these partitions before I issued the first warehouse receipt. Who do you mean by "account"?"

A. By "account," I am speaking of the account of the Lawrence Warehouse Company, and in this case, the Central Auto Supply.

Q. Wherever you used in your testimony the words "the account," then you mean the Central Arizona [61] Auto Supply?

A. Yes, sir.

Q. And how did this man Brown get in there and get this merchandise that he took out to the loading dock?

(Testimony of Harold A. Mitchell.)

A. That part of the actual withdrawal of that was made in more or less in a backhanded way. This merchandise was ordered to be shipped. It happened to be All Seal Power Piston Rings, and after the piston rings were packed, we recorded them as going out under our delivery instructions. I believe the amount ran close to \$1200. There was a warehouse manager, the original warehouse manager that got tipped off that this particular merchandise was not being withdrawn for sale, that it was more or less on a claim that Mr. Brown was trying to get his hands on.

Q. Well, wasn't it a fact that his company had delivered this merchandise to the Central Auto Sales on open account and it had not been paid for and he was trying to get it back, wasn't that the situation?

A. Well, I don't know the exact situation there. It was delivered to us by the Central Auto either on the original inventory or subsequent shipment received into the warehouse as commodities to be——

Q. You don't know whether any of the merchandise that was delivered to you by the Central Auto Sales was paid for or not, do you? A. No.

Q. You did know that a great deal of it was purchased on open account, isn't that true?

A. Well, in the ordinary course of business, that would be true.

Q. It was purchased on open account and then delivered to you by the purchaser and you issued your warehouse receipt to the Valley Bank, is that correct? A. Yes, sir.

(Testimony of Harold A. Mitchell.)

Q. Now, with reference to these padlocks that you told about, those gates weren't kept padlocked during the business hours, were they?

A. No, sir, they were kept padlocked when the warehouse was open for business and supervised by one of our employees, many times, and for a long time we had to lock them because of not having enough employees.

Q. You say they were kept padlocked when the place was open for business?

A. No, no, they are open, the doors were open for business.

Q. And there was nothing to prevent any employee [63] or officer of the Central Auto Sales from walking in that department or that portion of the place that was leased to you, was there?

A. No, only with permission of the Lawrence Warehouse Company in the act of delivering commodities to the warehouse or receiving commodities that was to be delivered from the warehouse, or assisting and caring for the preservation of the goods.

Q. Now, prior to your warehousing agreement here, or lease, whatever it is, this building was occupied by the Central Auto Sales, wasn't it?

A. Yes, sir.

Q. And then this lease was executed——

A. On July 26th, yes, sir.

Q. From the Central Auto Sales to you for a portion of this building? A. That is right.

(Testimony of Harold A. Mitchell.)

Q. And then you required that some wire partitions be put up where there weren't walls?

A. That is right.

Q. Now, you hired then, I believe you told us, this warehouse manager, two assistant warehouse managers and a bonded clerk, is that right?

A. To start with, there were three assistants and a bonded clerk. [64]

Q. They had all been in the employ of the Central Auto Sales, hadn't they?

A. Central, yes, sir, I believe they all had.

Q. And they continued in your employ for how long?

A. Well, we had several changes down there. I'd have to refer to the files to get the exact dates, but the bonded clerk changed several times. We had several changes with the counter men. The counter men were put there for a specific purpose.

Q. How about the warehouse manager, did he stay all the time?

A. No, the warehouse manager was changed, I believe, in October.

Q. Now, who hired the people that replaced those original employees, did you?

A. I, myself, as representative of the Lawrence Warehouse Company, hired them.

Q. I notice in Mr. Saxon's deposition here, he says that he did. That is not correct, is it?

A. Well, in this specific change, there was quite a change right after he was selected as general

(Testimony of Harold A. Mitchell.)

manager. We changed three men. Two men I brought indirectly from other warehouses and he approved them as having knowledge of that particular inventory. The warehouse manager was advertised [65] for and I believe six or seven showed up. We all sat in and listened to his past experience, where he had worked, and finally a warehouse manager was selected. I selected him. He was approved, of course, by one of the officers of the Company.

Q. Of this Central Auto Supply?

A. Of the Central Auto Supply.

Q. Was that Mr. Saxon?

A. I believe at that time that was Mr. Hargrove, Bill.

Q. Now, all of those employees that you testified to that were paid by the Lawrence Warehouse Company, you know, do you not, that the Lawrence Warehouse Company billed the Central Auto Supply for their wages, and that money was paid by the Central Auto Supply to the Lawrence Warehouse?

A. According to our contract, our field warehouse storage contract with any concern, they agree to reimburse us for any services rendered at the warehouse.

Q. Well, that is what was done in this instance, wasn't it?

A. Certainly, we bill back for all of our services.

Q. You paid those bills and then you sent the

(Testimony of Harold A. Mitchell.)

bill to the Central Auto Supply and they paid you, [66] is that right?

A. Well, we invoice them for their salary, of course, and are in turn billed back, which is a part of our service charges.

Q. Now, you referred awhile ago to this Brown trying to get this merchandise out and that you said it was hot merchandise. What do you mean by that?

A. Well, I mean that under the circumstances of the withdrawal, we felt the merchandise was withdrawn from the warehouse under the pretense of having a sale for it locally. After the warehouse manager realized what kind of withdrawal it was, even though we were under our limit allowed by the Bank, I was notified and I immediately went to the warehouse and the shipping dock and secured the merchandise.

Q. By "hot merchandise," you mean then it was merchandise that this man was trying to get in payment of a debt, is that right, or what did you mean by the term "hot merchandise"?

A. Well, I meant by that that he had absolutely no right or title to the merchandise or any legitimate order to ship.

Q. Even though he had not, or his Company had not been paid for the merchandise? [67]

A. Well, that part of it, as warehouse men, we would not know. I do realize, though, that had he approached the Lawrence Warehouse Company and

(Testimony of Harold A. Mitchell.)

the Bank, we would probably have both agreed to allow him to take it. The amount was so small.

Q. You didn't, though?

A. Well, he didn't approach us, he took it.

Q. Now, when was that with reference to the bankruptcy of the Central Auto Supply, how long prior?

A. I'd say that was prior to October.

Q. Prior to October of what year? A. '46.

Q. It was, then, shortly after you had made this original lease?

A. Well, it was the same year, yes.

Q. And when was it you cut off the deliveries to the Central Auto Supply?

A. You mean the final cut-off?

Q. No, you said you cut off the deliveries at one time.

A. Well, the exact dates of that, I'd have to refer to the examiner's reports on that.

Q. How long did that remain cut off?

A. I'd say over the week-end, or maybe two or three days. [68]

Q. Well, without the exact dates, can you give us about when that was?

A. Well, say, January, 1947.

Q. Now, when you first went in there under your lease and required that the Central Auto Supply build these fences or partitions, or whatever you call them, did you require that the Central Auto Supply publish any notice under the Bulk Sales

(Testimony of Harold A. Mitchell.)

Act that it was turning this merchandise over to you?

Mr. Craig: We object to that question upon the ground that it calls for a legal conclusion of this witness.

The Court: Well, that would be a question of fact, whether they published any notice.

Mr. Craig: Well, you might ask him whether he published any notice.

Mr. Perry: That is what I intended.

A. We published a notice at all entrances to the warehouse and within the warehouse that the commodities were held under the custody of the Lawrence Warehouse Company.

Q. Did you require that the Central Auto Supply publish any notices in any newspaper?

A. No, sir.

Q. Do you know whether that was done? [69]

A. No, sir.

Q. You mean you know it was not done?

A. I do not know whether it was done.

Q. Did you require that the Central Auto Supply record any notice in the County Recorder's office?

A. No, sir.

Q. You didn't at any time regard the Lawrence Warehouse Company as the owner of this property, did you?

A. As instigating the lease and have full control over the areas that had been leased, yes.

Q. I mean the merchandise within that area.

(Testimony of Harold A. Mitchell.)

A. Not as owners, we were storers of the merchandise.

Q. You never regarded yourself as owners?

A. No, sir.

Q. You said awhile ago in your other testimony that you regarded yourselves as bailee for hire?

A. Bailee for hire or custodian for collateral.

Q. Who do you figure hired you?

A. The Central Auto Supply Company entered into a contract with us for the storage of their material.

Q. And for whose benefit did you consider you were hired?

A. For the benefit of the Central Auto Supply. [70]

Q. Not for the benefit of the Valley National Bank? A. No, sir.

Q. Huh?

A. No, sir. These receipts could have been issued to any person, any bank, so designated by the Central Auto Supply.

Q. You knew that the deal was, they were to be issued under the Valley National Bank because it was loaning them money?

A. Oh, yes, sure. They could have changed in the interim, which often happens.

Q. There wasn't any mystery about that, that was the purpose of the transaction, wasn't it?

A. Oh, yes.

Mr. Perry: That is all.

(Testimony of Harold A. Mitchell.)

Redirect Examination

By Mr. Craig:

Q. Mr. Mitchell, as a matter of fact, under this operation that you were conducting down there which you had been directed so to do, you could have issued warehouse receipts to anybody regardless of whether it was the Valley National Bank or anybody else? A. Yes, sir. [71]

Q. Had your depositor directed you to issue them? A. That is right.

Q. As far as your operation in the field warehousing business, Mr. Mitchell, this operation was no different than any other operation that you conduct, is that right? A. That is right.

Mr. Craig: That is all.

Recross-Examination

By Mr. Perry:

Q. It was different in this respect, that in this case the Central Auto Supply went bankrupt and that does not happen always, does it?

A. No, sir.

Mr. Perry: That is all.

The Court: We will suspend at recess until 1:30.

(Thereupon a short recess was taken.)

1:30 o'Clock, P.M., March 17, 1949

All parties as heretofore noted being present, the trial resumed as follows: [72]

HAROLD A. MITCHELL

resumed the witness stand and testified further as follows:

Mr. Craig: At this time, if the Court please, may the record show that the deposition of Mr. C. W. Saxon be written into the record?

The Court: All right.

DEPOSITION OF C. W. SAXON

C. W. SAXON

was called as a witness on behalf of the plaintiff, and being first duly sworn by the Notary, testified as follows:

Direct Examination

By Mr. Perry:

Q. Will you state your name, please?

A. Chester Saxon.

Q. Where do you live?

A. 2317 West Jefferson.

Q. What is your business or occupation?

A. President of the Davis Ventilated Awning Company.

Q. Did you have some connection with the Central Auto Supply Company, a corporation?

A. I was the manager.

Q. During what period? [73]

A. From about the 1st of December until the end of the temporary receivership.

Q. The 1st of December of what year?

(Deposition of C. W. Saxon.)

A. 1946 until July 21st, 1947.

Q. Now during a portion of that time you were manager and later temporary receiver, is that correct?

A. That is correct.

Q. And during what portion of that period were you the manager of the business?

A. Until the time of the temporary receivership.

Q. Do you recall when that was?

A. I believe it was July 21st.

Q. And then you were temporary receiver under appointment by the United States District Court for this district for how long?

A. About six weeks, up until the permanent trustee was appointed.

Q. Now where was the place of business of the Central Auto Supply Company while you were manager?

A. 601 East Adams.

Q. And will you just describe to us the interior of that place of business, how it was laid out at that time?

A. Well, the building itself consisted of two buildings, two main buildings, a large [74] building that included the warehouse, machine shop, and a smaller building that had been built previous to the construction of the large building, that was used as a carburetor repair laboratory and ignition repair, and a leased separate business in the front portion.

Q. And what was the separate business?

A. Wood, radio and electronics. It wasn't that way during all that time. It was leased I believe about the 1st of April.

(Deposition of C. W. Saxon.)

Q. And prior to that time what was the portion of the building that was later leased out used for?

A. We had some storage in there, mostly scrap as a matter of fact, miscellaneous parts and so forth.

Q. Now with respect to the portion of the property that you used, was some of that divided off by wire partitions?

A. Yes, sir, it was.

Mr. Perry: Will you mark this as Plaintiff's Exhibit A for identification, please?

(The document referred to was marked Plaintiff's Exhibit A for identification by the Notary.)

Q. (By Mr. Perry): Mr. Saxon, I show you a [75] document that is marked Plaintiff's Exhibit A consisting of three pages, the last one being a blueprint, and the blueprint itself being marked Exhibit A, Lawrence Warehouse Company, Phoenix, Arizona, Arizona Warehouse Number 21, and ask you if that fairly and accurately represents the premises you have been describing and if the red lines denote the partitions that you have mentioned.

A. That is right.

Q. Now, during the period that you were manager there will you describe to us how sales were made by you, where the goods or property sold were within the partitions shown within the red lines on the exhibit I have handed you.

A. In other words—

(Deposition of C. W. Saxon.)

Q. Just what was done, how it was handled.

A. About 80 per cent of our business, of course, was sold out the back door or was delivered by a delivery boy. There were some sales over the counter, but the majority of the sales in our particular type of business come in over an order desk. A man fills the order out of the storeroom, and he is in charge of the delivery boy who then makes the delivery. As far as the counter sales are concerned, some sales go out over the counter, and even some sales that would [76] be made up from our order desk in the rear would be picked up at the counter by the customer. Now we had—the setup in the plant was that we had an order desk man on full time and a counter man on full time, and sometimes we had during part of that period, we had as high as two and three counter men and assistant order desk men.

Q. And did you have any stock down there that was not within these partitions that are shown here?

A. Yes, we did have. We had considerable stock of wire and such in the carburetor and electrical section. However, if I am getting this correctly, that was never carried under Lawrence inventory. The only thing outside that we had would be items that were in display.

Q. Well, on a sale of items that were not within the Lawrence inventory, was that treated any differently as far as handling it was concerned than a sale of items that were within the Lawrence inventory?

(Deposition of C. W. Saxon.)

A. Would you mind repeating that again?

Mr. Perry: Would you read it?

(The question was read by the Notary.)

A. Well, yes, to a certain extent. For example, in the sale of rebuilt motors, which [77] was the largest amount of sales we had—when I said 80 per cent of the sales were out the back door, I am speaking of sales out of the warehouse. We did make certain sales out of our shop handled in an entirely different manner than the sales out of the warehouse. We had a man on the order desk that was the warehouse manager. We were constantly taking parts from the warehouse into the shop. Now of course, those were charged out of Lawrence by the Lawrence Warehouse manager, but the sale was consummated on an entirely different type of ticket. That would be the greatest deviation from regular sales that we had.

Q. Lawrence Warehouse Company did maintain a man there, did they? A. Definitely.

Q. At all times? A. More than one.

Q. How many?

A. Well, I believe we had as high as four or five and never less than two, I believe.

Q. And did you pay those employees or did Lawrence Warehouse Company pay them?

A. Lawrence Warehouse Company paid them and we of course reimbursed Lawrence Warehouse. [78]

(Deposition of C. W. Saxon.)

Q. I see. Now if a customer came in to buy an item that was within the Lawrence inventory as you have mentioned, just tell us how that transaction would be handled.

A. For example a counter sale?

Q. A counter sale.

A. Well, the customer would come in—do you want all the mechanics of the sale?

Q. Yes.

A. A customer would come in, approach the counter, and would tell the counter man what is it he wanted. Now the counter man would go to stock, into the stockroom, bring out the parts and make out the counter ticket in triplicate, and made the ticket up according to the parts that were sold, the proper discounts, and actually handled it even down to receiving the money for the same, and in many cases, in some cases it was sent to the Cashier.

Q. The counter man, was that an employee of the Central Auto Sales or the Lawrence Warehouse?

A. The counter man was a regular Lawrence Warehouse man.

Q. A Lawrence Warehouse man?

A. That is right.

Q. Did you have anyone in your firm that [79] made sales direct?

A. Yes, we did, although we were the—we were set up in this manner, we would not make any sales at any time unless a Lawrence Warehouse

(Deposition of C. W. Saxon.)

man was present. So for that reason we had to stagger the shifts of the Lawrence employees so when we were down where we had a few employees we would either have an order desk man in there or the Lawrence Warehouse man, but we did attempt one time to—and didn't meet with much success, I may say—of attempting to get Lawrence to allow us to make sales even though their man wasn't present because it was getting to the point we were losing a considerable amount of money and couldn't maintain a large group of personnel, so they did say we could make sales, which I made several of and you will find in the recap of sales tickets, people's initials on there who were not Lawrence men, but they wouldn't definitely let us make any sales unless a Lawrence man was there.

Q. Was that common practice for you or someone else to make sales out of your stock, that was not an employee of the Warehouse Company?

A. Yes, if a Lawrence employee was present.

Q. Was there any change in the procedure during the time you were there as manager? [80]

A. Do you mean in sales procedure?

Q. Yes.

A. Well, about the only change of any magnitude was that when I came with the company they had no salesmen at all, that is, outside salesmen, and we did build up a small sales force, but as far as the ticket handling and everything, there were no changes made that way.

(Deposition of C. W. Saxon.)

Q. You referred to sales out the back door, what do you mean by that?

A. Sales that the customer doesn't appear to buy merchandise but makes a phone call. For example, a man has a garage, and he is by himself in the garage. He can't close his garage to come in town. He calls in. That would be most of the orders that we sold. He would call in and call the order desk. The order desk was presided over by the warehouse manager. He would get the call and either he himself, or we did have from time to time until we finally got down to absolute rock bottom, assistants who worked under him, who were also on Lawrence, who would make the orders out, and the order desk man would make out the tickets and the delivery boy deliver them.

Q. Who got the money?

A. The money was regular billing form where they [81] have sales that came back in over the order desk, and it was billed at the end of the month.

Q. In the first instance a purchaser making a purchase there, would that remittance go to your company or the Lawrence Warehouse Company, do you understand what I mean?

A. I think I do.

Q. If for example, I went in and bought \$5 worth of stuff and gave a check for it, would that go to the Central Auto Sales or to the Lawrence Warehouse Company?

(Deposition of C. W. Saxon.)

A. The check itself—there is a couple of ways we can approach this, I hope I can make this clear. All billing naturally was taken—was made payable to Central Auto Supply because we felt that Central Auto Supply was in the business of selling auto parts, not Lawrence Warehouse, even though they had control of them. We did at the same time—I might say that most of the money or a great share of the money that came in as the result of those sales had to in turn be paid out for Lawrence pay-rolls and also for—depending on what our loan was at the bank, to keep our loan more or less even with them.

Q. In the first instance, however, the purchaser paid the money to Central Auto? [82]

A. The billing was made out that way.

Q. The actual remittance was received that way?

A. Yes.

Q. Were there signs in that building indicating Lawrence Warehouse had any interest in it?

A. Yes, there were.

Q. Where were they placed?

A. Well, they were placed at all the entrances as I remember, and I believe they were on each section—I can't state exactly, I can only state what I remember, but I believe they were on each of the gates and at the—I can say this, the premises covered by Lawrence were very well posted. In fact, every bin was posted that the commodity in them was the property of the Lawrence Warehouse Company.

(Deposition of C. W. Saxon.)

Q. Now this blueprint that I showed you, the red lines denote wire partitions, do they?

A. Not in all these, some of those are walls. This is really the front this way. The wire partitions would be along this section here.

Q. In direction, what is that?

A. That is just back of the counter. It closes the warehouse off from the main entrance.

Q. The main entrance faced which way? [83]

A. Faced north.

Q. Faced north, all right.

A. This is a wall.

Q. That is along the——

A. Along the west.

Q. The west? A. The east, rather.

Q. The east.

A. That is a wall along the back.

Q. Along the south?

A. The south. As a matter of fact, it is wall all the way with the exception of that.

Q. With the exception of where the gate is there?

A. This is the gate and this is the front.

Q. Now with respect to the property in the northwest corner.

A. That was wall all the way around with the exception of this entrance here which had a door.

Q. Now of the employees down there how many do you say were Central Auto Supply Company employees?

(Deposition of C. W. Saxon.)

A. Well, now, our number of employees varied. Would an average be what you are looking for?

Q. Yes, that would be all right. [84]

A. I would say the average number of Lawrence employees we had as I recall——

Q. I want the Central Auto Supply.

A. The Central Auto Supply?

Q. Yes.

A. Three in the shop—three men in the shop, one in the carburetor repair, that is four, two girls in the office. Six, myself would be seven, and the delivery boy would be eight. We did have some outside salesmen that varied from one to three or four.

Q. And the Lawrence Warehouse employees down there, about how many would that be?

A. We never had less than two. I believe at one time we had as high as five.

Q. And generally what was their job, what was their capacity?

A. Well, the prime or the main position held by any Lawrence man was the warehouse manager, the order desk and counter man, the second most important would be the counter man and the other three that I mentioned we had from time to time would be a second counter man and stock and inventory clerk.

Q. Now, distinguishing between the Central Auto Supply employees and the Lawrence Warehouse [85] employees, would the Central Auto

(Deposition of C. W. Saxon.)

Supply Company employees have access to the merchandise?

A. During working hours it was open, the place was open. We had access, we weren't kept out of there, no.

Q. Would one of your employees as distinguished from the Lawrence Warehouse Company go in and get items of merchandise and take them out?

A. That would happen, for example, when, say one of our employees might be assisting the regular counter man in making sales.

Q. Independently of that would it happen?

A. They all went over the counter, everything that went out of the back door was presided over by the warehouse manager and everything over the counter by the counter man.

Q. Assume that I had ordered something over the telephone from you and it was delivered to me in the way of you have detailed here, would there be anything to indicate to me that I was purchasing property of the Lawrence Warehouse Company?

A. To indicate that you were purchasing property of the Lawrence Warehouse Company?

Q. Yes.

Mr. Ray: I object to the question, it presumes a fact not in evidence that this was [86] the property of the Lawrence Warehouse Company, or that the Lawrence Warehouse Company claimed it to be its property.

(Deposition of C. W. Saxon.)

Mr. Perry: I think on that I will just withdraw the question.

Q. Under the same circumstances would there be anything that would indicate to me that that was property in the custody or warehoused with the Lawrence Warehouse Company?

A. I might say this, most of our customers were regular customers and you might say probably all of our accounts and our sales every month with the exception of new accounts coming in, would be classed as regular customers, and I think there wouldn't be one out of ten would not know that we were under Lawrence Warehouse. As a matter of fact we even had our saelsmen from time to time when they would go out—some of the sales resistance they met would be, "You fellows can't get parts," and we explained to them that we were under the Lawrence Warehouse and working under an agreement with the Bank, we could get what they wanted and could supply them, and most of our customers realized it, realized the fact we were under Lawrence. I could only say that they knew that. [87]

Q. Then other than the knowledge they gained in that fashion would there be anything that would indicate——

A. On the ticket there is nothing, in other words, on the ticket you might receive as a garage man there wouldn't be any indication it was Lawrence with the exception—no, there would be nothing that you could recognize.

(Deposition of C. W. Saxon.)

Q. And a sale over the counter, would there be anything there that would indicate that?

A. Definitely, because it would be almost impossible to walk into the building and buy anything over the counter without seeing 66 signs that said everything in the place was under the jurisdiction of Lawrence. As a matter of fact, it kind of took away from my display.

Q. Now, the Lawrence Warehouse Company employees that you refer to, had they been formerly your employees?

A. Yes, in most cases, although we hired some. We did most of the hiring and some of them went immediately under Lawrence.

Q. You would hire them and then put them under the Lawrence Warehouse Company payroll, is that right? A. Yes. [88]

Q. And were you there at the time this Lawrence Warehouse Company arrangement was made?

A. No, I was not.

Q. That was before your time?

A. That is right.

Q. And after you came there do you know whether employees that had been employed by the Central Auto Supply were continued in the employment of the Lawrence Warehouse Company?

A. There were employees there that were on Lawrence before I came that were also continued on Lawrence after I came, yes. Some of those were changed later on, they left and so forth and so on.

(Deposition of C. W. Saxon.)

Q. Who did the hiring and firing of Lawrence Warehouse Company employees?

A. Well, I did the hiring. There was very little firing done. The Lawrence Warehouse did that, what firing was done.

Q. But you hired the employees that went on the Lawrence payroll? A. Yes.

Mr. Perry: That is all. [89]

Cross-Examination

By Mr. Ray:

Q. As a matter of fact, Lawrence Warehouse Company had a written contract of employment with each employee? A. That is correct.

Q. You didn't sign that for Lawrence?

A. No, sir.

Q. Mr. Mitchell signed every contract of employment? A. That is right.

Q. That fixed the rate of pay? A. Yes.

Q. So actually he employed them?

A. Yes, that is right. As a matter of fact, I screened them and he employed them after we screened them, to make sure they would be able to handle the business.

Q. At the time they were discharged a written termination of employment was signed by them and by Lawrence, is that not correct?

A. As far as I know, yes.

Q. You mentioned that the Central Auto reimbursed Lawrence for their salaries. They re-

(Deposition of C. W. Saxon.)

imbursed Lawrence for their salaries to the extent the Bank wouldn't reimburse them? [90]

A. Yes, that is what it was supposed to have been.

Q. In this case actually many times it was necessary for the Bank to pay us in order to get the employees paid, was it not?

A. That is correct.

Mr. Ray: I think that is all.

Redirect Examination

By Mr. Perry:

Q. I want to ask one or two further questions on direct. How often was the inventory checked there?

A. Well, the inventory was checked on a weekly basis from incoming and outgoing merchandise. Our terms with Lawrence and with the Bank was that we would submit a record of all incoming materials and all outgoing materials weekly. We did make several—let's see, I think we made one at the end of December, we made at least two complete inventories, that, is, detailed inventories, outside of the perpetual or constant.

Q. Was there a daily checkup made?

A. Yes, every evening.

Q. And that was made every day?

A. That wasn't made—we made a daily check of all of our sales for the simple reason we knew that we at different times had a different level of how much we could sell without reporting, so we

(Deposition of C. W. Saxon.)

had to make a check every day to make sure. If the limit was \$2500 a week, we could sell that, we had to make sure we hadn't sold \$3500 or \$4000. We had to stay under that weekly release.

Q. How much could you sell out of there without making a report to the Valley National Bank?

A. That was changed two or three different times. The average amount generally ran about \$2500 a week.

Q. What was it when you were first manager there?

A. When I first came in they had closed the thing completely. I don't think I could give you—I do know we complied with whatever the limit was that was set at different times, but we worked on three or four different agreements with the bank during the period I was there, one, for example, being no matter what we sold we assigned our accounts receivable, and at that time there wasn't any particular limit except the Bank was getting all the money that did come in, and I believe the figures that could be used would be from \$2000 to \$2500 a week, in that neighborhood. [92]

Q. You testified that you made a report to the Bank once a week. Originally was that once a day and then changed to once a week?

A. No, the setup was that we were to make weekly reports as far as inventory was concerned, but we did have a limit as to the amount of sales or amount of material that could be released during

(Deposition of C. W. Saxon.)

a given period. Now the way that—the only way that we could determine whether or not we were staying within those limits, was to make a daily recap of sales which I got every evening. In other words, the total sales out of the warehouse daily as came in on the tickets, so that I knew whatever that limitation was—there were two or three different limitations during that period, so I would know by Wednesday, Thursday, or Friday we hadn't exceeded the amount to be released.

Q. Those daily recaps, were they transmitted to the Bank?

A. No, the only time it would have been necessary to do that would be when we were over, and I am sorry there was no time during the period we were able to exceed that release.

Q. Then how did you make your payments to the Bank? [93]

A. Well, we worked also there on more than one arrangement, but it was on this basis, the bank during the greater portion of the period that I was manager, had loaned us approximately between 50 and 55 per cent of the book value of our inventory. That was changed at different times, one to 60, to 70, and once back to 60 and back to 70, I believe, again. Now, I think I can best explain this with an example. Let's say our inventory was \$50,000 and the Bank at that time was loaning us \$25,000 or 50 per cent. If at any time our inventory was to drop below the point that the Bank had loaned

(Deposition of C. W. Saxon.)

us we were to pay them in cash the difference between the amount of money they had loaned us and the lesser amount of our inventory, which, in other words, would always bring—keep the loan percentage at a constant figure or better.

Q. I may not have this straight in my mind, but originally I understood you to say that money that came in was paid over to Lawrence Warehouse Company by you?

A. No, that is not correct.

Q. That is not correct?

A. No, I say the moneys that came in would be paid—we paid to Lawrence for them to pay employees that they had, and also that that money was to be used where if we were behind, happened to get a little behind on Lawrence. We ran, no matter what our percentage happened to be, we always ran on a very close margin.

Q. If the Bank had loaned you say 55 per cent, a purchaser bought an item say \$10, what became of that \$10?

A. What became of the \$10 that would be received?

Q. Yes.

A. Well, it would be used—put in the bank either in our general account, depending on where we were with Lawrence.

Q. All right.

A. If the 55 per cent, if we were right on the margin—now that is something that would be very

(Deposition of C. W. Saxon.)

difficult to ascertain for the simple reason that I always tried to keep at least a few hundred dollars ahead of that percentage because I knew that if once we were to drop back of it, that at the end of the week the Bank would do one of two things, and as a matter of fact, they would probably do one thing, and that is close the thing to make us stop selling until we were to bring the thing back up to the proper amount. So it was not only to my advantage but I had to [95] keep that figure ahead of it. What would have happened if we had fallen behind, there would be only two things, the bank would have had to increase our loan a certain percentage or made us a loan on the outside. The way we got around it in one or two cases, we got some additional capital from stockholders when we knew we would be behind.

Q. I am not making myself clear, but say in the course of a day you took in \$500, was any portion of that paid to the Lawrence Warehouse Company?

A. Do you mean just as a matter of course?

Q. Yes.

A. No, not as a matter of turning the receipts over to the Lawrence Warehouse, no.

Q. What would you do with it, then?

A. We would put it in the bank.

Q. And then check against it?

A. Our running expenses, our overhead and so forth, as well as purchase material, paying Lawrence payrolls, keeping our loan current at the

(Deposition of C. W. Saxon.)

bank. We had about 35 different expenses in the course of operating the business and there were periods during that time that the bank had our accounts receivable. [96]

Q. Well, out of your receipts now, what did you pay the Lawrence Warehouse Company, just the payrolls?

A. That is the only direct payment we made to Lawrence Warehouse was their payrolls. In other words, the billing charges and so forth.

Q. For their services?

A. That is correct.

Q. But they didn't get, or did they, any fixed percentage of the sales?

A. Let's put it this way—no, they didn't, but we made—I can say we did not make out any checks or pay any cash to the Lawrence Warehouse Company, but we did make payments to the Bank both in cash and by check that kept the Lawrence loan at a specified level.

Mr. Ray: You mean kept the bank loan at a specified level? A. Yes, that is correct.

Q. (By Mr. Perry): The Lawrence Warehouse didn't have any loan at the Bank as far as you know?

A. I don't know enough of the relationship between the Bank and Lawrence to know.

Q. It was your loan at the bank? A. Yes.

Q. And out of the proceeds of these sales [97] the only money the Lawrence Warehouse Company

(Deposition of C. W. Saxon.)

would get would be its charges under its contract?

A. We paid them their expenses as billed to us direct. We made no other direct payments to them. What happened between the Bank and Lawrence is something else.

Q. Then after paying Lawrence Warehouse whatever you had you could either pay the Bank or use in your current expenses, is that correct?

A. I might say, unless it is already understood here, that practically everything that we paid and everything that went out of Central Auto Supply was done with the full knowledge—and you might say my business was with the Valley National Bank, as far as that end was concerned, and Lawrence Warehouse on the inside, because I have had Mitchell come and tell me to do this and not do that, and the Bank has told me to pay these bills and not pay those.

Q. Mitchell was the Lawrence Warehouse man, is that right?

A. That is right.

Q. Within your knowledge, Mr. Saxon, were the creditors who sold goods to Central Auto Supply Company apprised of this Lawrence Warehouse agreement? [98]

A. Well, I would say they were apprised four or five different times. As a matter of fact, I got out form letters. I might say the only ones I might have missed might have been a few small ones in the City here, but from time to time all outside creditors were apprised of our actual condition. I even mimeographed balance sheets and sent to all of them.

(Deposition of C. W. Saxon.)

Q. Did you disclose in that this arrangement you had with the Lawrence Warehouse Company?

A. Very definitely.

Mr. Perry: That is all.

Recross-Examination

By Mr. Ray:

Q. At the present time do you know of any reason why you would not be available as a witness in this matter should it go to trial in March, 1948?

A. Not that I know of now.

Q. You expect to live in this area?

A. Yes.

Mr. Ray: No further questions.

Mr. Perry: Do you have any questions, Mr. Gust?

Mr. Gust: No. [99]

Mr. Perry: Do you want to waive signatures and everything on this?

Mr. Craig: Yes.

Mr. Craig: Mark these.

(Thereupon the documents were marked as Defendant Lawrence Warehouse Company's Exhibit E for identification.)

HAROLD A. MITCHELL

Redirect Examination

By Mr. Craig:

Q. Mr. Mitchell, I show you Defendant Law-

(Testimony of Harold A. Mitchell.)

rence Warehouse Company's Exhibit No. E for identification, and ask you what these instruments are?

A. That is an original and three copies of a warehouse receipt, Lawrence Warehouse Company warehouse receipt.

Q. Were those the type of receipts that were used throughout this transaction?

A. Exactly, they were non-negotiable warehouse receipts.

Q. Where did the first, the first green copy in that group go to?

A. The original was delivered to the bank, the second copy was delivered to the operating offices in Los Angeles.

Q. The operating office of whom?

A. The Lawrence Warehouse Company of Los Angeles. The second copy, the white copy was the warehouse manager's copy at our warehouse.

Q. That is the Lawrence Warehouse manager?

A. Yes, sir. The green copy was a copy for the Central Auto Supply, the depositor.

Q. Now, that is the last copy of the group?

A. The last green copy.

Mr. Craig: We offer these in evidence, Exhibit E in evidence.

Mr. Perry: We have no objection.

(Thereupon the documents were received as Defendant Lawrence Warehouse Company's Exhibit E in evidence.)

[illegible]

(Testimony of Harold A. Mitchell.)

Q. (By Mr. Craig): Now, Mr. Mitchel, again referring to Lawrence Warehouse Company's Exhibit E in evidence, I will ask you if the commodities or goods represented by each warehouse receipt was listed on the face of the receipt at the time of the issuance, or on a supplemental sheet thereto attached when the receipt itself was not large enough to carry the list of the inventory?

A. Well, the face of the receipt included the number of packages or units received into the [101] warehouse described as so many auto parts, supplies and accessories as per inventory attached thereto, which was the inventory in detail corresponding, of course, to the number of units shown on the face of the receipt, and the inventory was made a part of the receipt.

Q. Now, Mr. Mitchell, I show you Defendant Lawrence Warehouse Company's Exhibit No. F for identification and ask you what that is.

A. Well, that is a confirmation of delivery form that is used to list the commodities delivered from the warehouse under dealer instructions given to the Lawrence Warehouse Company by the Bank. I may explain that. In other words, that the Bank authorized us to deliver \$5000 at any one time. When we reached that limit, we then list the commodities on confirmation of deliveries. That went to the Bank and was signed by the Bank and returned to us. Until we receive a signed copy from the Bank, no more deliveries were made.

(Testimony of Harold A. Mitchell.)

Mr. Craig: We offer Defendant Lawrence Warehouse Company's Exhibit No. F for identification in evidence.

Mr. Perry: No objection.

(Thereupon the document was received and marked as Defendant Lawrence Warehouse Company's Exhibit F [102] in evidence.)


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ORIGINAL TO LAWRENCE

CONFIRMATION OF DELIVERY

No. _____



**LAWRENCE
SYSTEM**

Date _____

CHECK ONE ADDRESS { 37 Drumm Street, San Francisco 11
One LaSalle Street, Chicago 2
Cascade Bldg., Portland 4
610 So. Broadway, Los Angeles 14

0000

72 Wall Street, New York 5
Liberty Bank Bldg., Buffalo 2, New York
Shell Bldg., Houston 2, Texas

3333

The delivery to _____
under the authority heretofore given to you, of merchandise as indicated below, stored in your _____ Warehouse No. _____, is hereby confirmed.

DEPOSITOR'S DECLARED VALUES

WAREHOUSE RECEIPT NO.	ITEM	UNITS	DESCRIPTION	UNIT VALUES	EXTENSION OF UNIT VALUES

TOTAL

Yours very truly,

WAREHOUSE RECEIPT HOLDER

To Be Signed By
Authorized Officer

By

Title

Admitted and Filed March 17, 1949.

Date Signed

(Testimony of Harold A. Mitchell.)

Q. (By Mr. Craig): Now, Mr. Mitchell, at the conclusion of this transaction, when the Lawrence Warehouse Company withdrew and the business was wound up, there were then on the premises certain goods, wares and merchandise, were there not? A. Yes, sir.

Q. And were those goods and wares and merchandise under warehouse receipt at that time?

A. Yes, sir.

Q. And how did the inventory on hand compare with the outstanding warehouse receipts at that time, were they balanced?

A. We took an inventory beginning July 21st to approximately August 12th. That inventory checked in units with the balance of the warehouse receipts.

Q. And to whom were those goods delivered?

A. Those were delivered to the Bank approximately November 12th.

Q. Of what year? A. '47.

Mr. Craig: That is all. [103]

Recross-Examination

By Mr. Perry:

Q. How did you deliver them to the Bank, Mr. Mitchell?

A. By turning possession of our area over to the Bank, removing our signs, stock cards and blueprints. Of course the Bank signed a release for us on all balances of outstanding warehouse receipts.

(Testimony of Harold A. Mitchell.)

Q. You didn't move any of that stuff out of there, did you?

A. Not physically remove any merchandise.

Q. That was after the Trustee of Bankruptcy had been appointed by this Court?

A. Yes, sir; that was November 12th, I believe, approximately.

Q. What you did, you took a release from the Bank and left the stuff sitting there?

A. Yes, sir.

Mr. Perry: That is all.

Mr. Craig: That is all.

(The witness was excused.)

Mr. Craig: Mr. Miller. [104]

WILLIAM H. MILLER

was called as a witness on behalf of the Lawrence Warehouse Company and being first duly sworn, testified as follows:

Direct Examination

By Mr. Craig:

Q. Will you state your name?

A. William H. Miller.

Q. Where do you reside?

A. 526 East F Avenue, Glendale, Arizona.

Q. Where are you presently employed?

A. Car Life Service Company, 1525 West Van Buren.

(Testimony of William H. Miller.)

Q. Were you ever employed by the Lawrence Warehouse Company, Mr. Miller?

A. Yes, sir.

Q. When?

A. I believe that it started in 1946, approximately in July or August, I believe.

Q. And how long were you employed by the Lawrence Warehouse Company?

A. I would say for approximately a year.

Q. And in what capacity were you employed?

A. I was the Lawrence Warehouse manager.

Q. And where did you carry out your duties as warehouse manager?

A. I had a desk in the back of the parts department where all incoming merchandise was received, and all outgoing merchandise was shipped out.

Q. At what place?

A. I believe you have the photos there, we could point it out on that. It was behind the stock shelves.

Q. Was that on the premises designated as the Central Auto Supply Company business on East Adams Street in Phoenix?

A. Yes, sir.

Q. Were you employed as warehouse manager at any other locality, Mr. Miller?

A. No, sir.

Q. Now, did you sign an employment contract with the Lawrence Warehouse Company, Mr. Miller?

A. Yes, sir.

Q. And did you sign an application for a surety bond?

A. Yes, sir.

(Testimony of William H. Miller.)

Q. And by whom were you paid during your employment?

A. Lawrence Warehouse Company.

Q. Now, Mr. Miller, I show you Defendant Lawrence Warehouse Company's Exhibit E in evidence, which purports to be a non-negotiable warehouse receipt or receipts, and various copies thereof, and ask you if you are familiar with those [106] instruments? A. Yes, sir, I was.

Q. During the course of your employment, were you—at that time were you required, as one of your duties, to issue such warehouse receipts as warehouse manager? A. Yes, sir.

Q. And did you so issue them? A. Yes.

Q. Where did you sign those receipts, Mr. Miller?

A. It has a place here at the bottom that is supposed to be signed by a bonded warehouse manager.

Q. And that is where you signed those receipts when you were employed as warehouse manager?

A. Yes, sir.

Q. And where did you send the receipts?

A. One, the original, went to the Lawrence Warehouse Company, and one was kept in our files, and one, I believe, was sent to the bank. It has been some time ago, kind of hard to remember it now exactly.

Q. Now, Mr. Miller, I call your attention to the second copy, being the first white copy of this exhibit, being Defendant Lawrence Warehouse [107]

(Testimony of William H. Miller.)

Company's Exhibit E in evidence, and call your attention to the back of that second copy where there is provided a place for signature by the depositor. Now, do you know, in the course of your duties, who the depositor was in this transaction.

A. Well, the depositor, I don't quite understand your question.

Q. Well, do you know whether or not you were required to have a signature to be entered there at that place?

A. Yes, there was supposed to be signed, but I don't recall by whom.

Q. Do you recall whether or not you required a representative of the Central Auto Supply to sign that instrument at that place?

A. I believe it was. It was the depositor and then signed by one of the owners.

Q. One of the owners or officers of that company? A. Yes, sir.

Q. Now, in the course of your work down there, Mr. Miller, were you called upon to complete and fill out and deliver confirmation sheets in the same form as Defendant Lawrence Warehouse Company's No. F in evidence? [108] A. Yes, sir.

Q. And did you fill out those forms during the entire time you were working there as warehouse manager? A. Yes, sir.

Q. Now, Mr. Miller, do you know whether or not the premises where you were working as warehouse

(Testimony of William H. Miller.)

manager were locked at all times that you or some representative of the Lawrence Warehouse Company was not present on those premises?

A. Yes, sir; they were locked up every evening upon leaving when the bonded employees were gone.

Q. Do you know whether they were locked at any other time?

A. They were locked at all times that there was not a bonded employee there.

Mr. Craig: That is all.

Cross-Examination

By Mr. Perry:

Q. Before you went to work for the Lawrence Warehouse Company, were you employed by the Central Auto Supply Company? A. Yes, sir.

Q. For how long?

A. I went to work for—it was originally the Arizona Piston Service Company in '45, I believe it was.

Q. And you stayed with them until this arrangement was made with the Lawrence Warehouse Company? A. Yes, sir.

Q. And then your employer after that was the Lawrence Warehouse? A. Yes, sir.

Q. But you were still right there on the place of the Central Auto Supply Company, is that right?

A. Yes, sir.

Mr. Perry: That is all.

Mr. Craig: That is all.

(The witness was excused.)

Mr. Craig: Mr. Wildman.

AUSTIN K. WILDMAN

was called as a witness on behalf of the defendant Lawrence Warehouse Company and being first duly sworn, testified as follows:

Direct Examination

By Mr. Craig:

Q. Will you state your name, please?

A. Austin K. Wildman.

Q. Where do you reside, Mr. Wildman?

A. 1318 East Whitton Avenue, Phoenix. [110]

Q. By whom are you employed?

A. Five Points Ice Company at the present time.

Q. Were you ever employed by the Valley National Bank of Phoenix? A. Yes.

Q. When?

A. In '42, December, '42, to January, '49.

Q. What was your capacity while you were employed by the Valley National Bank?

A. I was assistant Cashier and Loan Officer.

Q. During the course of your employment did you have occasion—occasion to enter into a transaction with the Lawrence Warehouse Company and the Central Auto Supply Company?

A. Yes, sir.

Q. Approximately at what time did you enter into any arrangement with those organizations?

A. I don't remember when I first started loaning money to the Central Auto Supply, but I believe it was late in '45 or early in '46.

(Testimony of Austin K. Wildman.)

Q. Now, Mr. Wildman, will you explain to the Court just how you came to loan money to the Central Auto Supply Company, and what security, if any, you demanded upon such loan, and how they secured or arranged for it, if at all?

A. Well, the first loan, as I recall, was in [111] connection with their new building that they built at 601 East Adams Street. That was secured by a real estate mortgage and an assignment of their accounts receivable. Later on, the assigned accounts receivable were released and they substituted therefor a chattel mortgage on their then equipment, and then about the middle of '46, they had moved into this new building and were short on inventory and wanted to make arrangements to increase that inventory. At that time they arranged with the Lawrence Warehouse Company to warehouse their inventory and the Bank agreed to accept those Lawrence Warehouse receipts covering this inventory as security on additional loans. I don't remember the exact amount that we started out loaning, I think it was around 60 or 65 per cent of the Central Auto Supply's cost of the inventory. That was continued then until the Central Auto Supply filed a petition in bankruptcy. There was, oh, different arrangements made from time to time. The Central Auto Supply went through quite a trying experience financially there in '46, because their chief source of supply was on strike and the strike lasted for several months. They were buying where and

(Testimony of Austin K. Wildman.)

when they could get anything that they could resell. [112] So, we had to work pretty close with them because they could never keep the account on the satisfactory basis that it was originally set up.

Q. Now, Mr. Wildman, can you explain to the Court the mechanics of handling these—this merchandise and inventory with respect to these warehouse receipts, so far as the Bank was concerned?

A. Well, to start with, they brought in one receipt covering all of the inventory that had been placed in the Lawrence Warehouse. We made a loan on a certain per cent of that—the value of that inventory that was placed in the Lawrence Warehouse. The arrangement through a written authorization that we gave to the Lawrence Warehouse, they could deliver upon request of the Central Auto Supply, inventory up to a certain dollar amount. When it reached that dollar amount, and I don't recall what its release provisions were, a release would be prepared on what they called a "confirmation of delivery". That confirmation of delivery would be brought into the Bank; one copy would bear the signature of an officer of the Central Auto Supply, indicating that that merchandise had been delivered to them. They would bring in a check equal to the same [113] percentage that we had loaned on that merchandise. In other words, if it was 65 per cent that we had loaned on it, they would bring in a check with that release, that check to apply to reduce the loan. They would bring in—

(Testimony of Austin K. Wildman.)

the Bank would then execute that release when they had received the payment on it. Now, under the authorization given by the Bank to Lawrence, they required that those confirmation of deliveries be submitted at least once each week. If the commodities delivered reached a certain dollar value before the week was out, they would have to bring them in and get them executed, get the Bank to sign a release before they could deliver more merchandise.

Q. And at the same time would they be required to bring in a check for the amount covering that?

A. Yes, that is the way the transaction started out. Now, later on, they would be short of funds, so—and having received additional merchandise they would sometimes bring in another warehouse receipt covering merchandise of a value approximately of what was being released and we would accept that as substitute collateral in place of reducing the loan.

Q. And under those circumstances you would then also execute a confirmation of delivery and let the Warehouse Company deliver further goods?

A. Yes, that would be a means of effecting the substitution.

Q. In other words, they were just paying with more goods for security rather than paying in money?

A. That is right.

Q. And Mr. Wildman, with respect to those confirmation of delivery sheets, were they in all

(Testimony of Austin K. Wildman.)

cases returned to the Lawrence Warehouse Company?

A. Those came in to us in triplicate. The original was sent to the Lawrence Warehouse Company's Los Angeles office, one copy was retained by the Bank for their record, and one copy returned to the Lawrence Warehouse manager at the warehouse.

Q. Now, throughout these negotiations, Mr. Wildman, and throughout this credit arrangement, did you, on behalf of the Bank, actually deliver to the Lawrence Warehouse instructions with respect to the releasing of these goods?

A. Yes, that was written instructions, and when there is any change made, we write complete new instructions.

Q. And were those instructions also delivered to the Central Auto Supply, or were they advised of such instructions?

A. No, I—those instructions would be written up in triplicate and usually sent to the Lawrence Warehouse Company's office at Los Angeles, although sometimes they would be delivered to Mr. Mitchell or some other Lawrence Warehouse examiner here in Phoenix.

Q. Now, Mr. Wildman, when this transaction or transactions terminated with the Petition for Bankruptcy of the Central Auto Supply Company, did you receive the goods then in storage at the Lawrence Warehouse Company's warehouse there?

(Testimony of Austin K. Wildman.) ,

A. Well, that was received under the terms of an order entered into by the Referee in Bankruptcy, I believe.

Q. To refresh your recollection, Mr. Wildman, wasn't a stipulation entered into between the Bank and the Referee or Trustee in Bankruptcy with respect to the delivery of these goods?

A. It was.

Q. And did you give the Lawrence Warehouse Company the releases for those goods and merchandise that were then in storage?

A. We released—we gave them a release for the merchandise and paid the balance of the Central Auto Supply account owing to the Lawrence Warehouse Company.

Q. You paid the charges that the Lawrence Warehouse Company had made against the Central Auto [116] Supply for its service, the Bank actually paid those to the Lawrence Warehouse Company? A. That is right.

Q. Why did you make that payment to the Lawrence Warehouse Company?

A. Because they had custody of the inventory and in that position had a warehouseman's lien for the amount due them.

Q. Therefore, in order for you to get possession of the goods you were required to pay the Lawrence Warehouse Company? A. That is right.

Mr. Craig: That is all.

(Testimony of Austin K. Wildman.)

Cross-Examination

By Mr. Perry:

Q. Mr. Wildman, that stipulation that you referred to, that was not entered into until January 5th, 1948, was it? A. I'd have to see.

Q. You don't remember. May I have that, please (Addressing the Clerk)? I show you this document from the original files in this case and ask you if that is the Stipulation that you referred to, being identified by the Clerk's Letter No. 9?

The Court: If that is the stipulation, why [117] don't you stipulate to it?

Mr. Craig: Well, it is the stipulation, but there is no date on it. There is a filing date on top.

The Court: Maybe it's the same as the day it was filed.

Mr. Criag: I don't know when it was filed, I wasn't here. Do you know when it was actually signed?

Mr. Perry: Oh, my recollection is, it was within a few days before that filing date.

The Witness: This is the stipulation I was referring to.

Mr. Perry: All right.

The Witness: We had taken possession before that date.

Mr. Perry: How did you take possession, Mr. Wildman? Did you take that away from the Trustee in Bankrutecy?

(Testimony of Austin K. Wildman.)

A. The Trustee in Bankruptcy never had it.

Q. And what did you do with it when you took possession, you left it right there, didn't you?

A. We took the keys to the padlocks and to the building——

Q. Now, they were given to you by the Lawrence Warehouse Company, weren't they? [118]

A. That is right.

Q. And when was that, do you recall?

A. I believe it was in November, but the exact date I can't recall.

Q. It was long prior to the signing of this stipulation, wasn't it? A. Yes.

Q. About how long before that?

A. Apparently this stipulation was entered into about the first of January, say, probably six weeks, two months, before that.

Q. And the way you took possession was simply that the Lawrence Warehouse Company turned the keys over to you, is that right?

A. We gave them the release or receipt for the inventory that was there.

Q. The goods stayed right there in the Central Auto Supply Company's place of business, in that portion of it that had been leased to the Lawrence Warehouse Company? A. That is right.

Q. You didn't move anything out of there until this stipulation was made, did you?

A. There was an agreement considerably ahead of this for the entering into this stipulation, Mr.

(Testimony of Austin K. Wildman.)

Perry, and I believe that we did start selling [119] somewhat before that.

Q. In any event, what I am getting at is that the things stayed right there in the warehouse until after this stipulation was entered into, unless there was some portions of it that were sold prior to that time by agreement between the parties?

A. Yes. As I recall, I asked—called up Mr. Gust and asked him to get us something in writing so we would have it in the file on this.

Mr. Perry: Yes. Mr. Craig has shown me a copy of an order authorizing the stipulation which was entered by the Referee apparently on November 17th, 1947.

Q. Now, Mr. Wildman, did you have financial statements from the Central Auto Supply Company when you made these loans?

A. We had a statement from time to time. Some periods there we had them monthly.

Q. Do you know if they are available here in court? A. No, I don't.

Mr. Perry: Do you have them, Mr. Gust?

Mr. Gust: What is it?

Mr. Prery: The financial statements that the Bank took from the Central Auto Supply. [120]

Mr. Gust: I doubt if I have them. There may be some.

Mr. Perry: In any event, when you made the original loan for security on the real estate mortgage, you took a financial statement then, did you?

(Testimony of Austin K. Wildman.)

A. Yes.

Q. And later when you loaned on the security of the chattel mortgage on the equipment, you took a financial statement, did you?

Mr. Craig: Oh, if the Court please, we object to this particular line of questioning as being wholly immaterial to the issues involved in this case.

The Court: It might be material, I can see where it would be.

The Witness: Well, we had fairly current statements from time to time, and just when we took those statements, I couldn't say from memory.

Mr. Perry: Probably as much as every month during this period of time?

A. When they were in difficulties we were getting them quite often.

Q. Now, Mr. Wildman, it is a fact, isn't it, that on every one of these financial statements there was listed bills payable or accounts payable of the Central Auto Supply to wholesalers and manufacturers and distributors for merchandise that had been purchased and not paid for?

A. They list all accounts payable. They didn't say what they are generally.

Q. Do you recall anything about the amounts of them?

A. No. They increased quite sharply on towards the last. I do recall that.

Q. You knew, of course, that the Central Auto Supply was buying merchandise on open account?

(Testimony of Austin K. Wildman.)

A. Yes.

Q. And they owed for it? A. Yes.

Q. Now, you never—you did take a chattel mortgage on the equipment at one time?

A. That is right.

Q. But you never took or attempted to take any chattel mortgage on their stock of merchandise?

A. No.

Q. And why? What was the reason for that, Mr. Wildman?

Mr. Craig: Oh, we object to that, if the Court please.

The Court: I didn't know you could do that.

Mr. Perry: Well, you can't, that is just the point, if the Court please. [122]

The Court: Well, I guess that is the reason they didn't do it.

Mr. Perry: All right.

The Witness: It is not the Bank's practice.

The Court: You can't do that.

Mr. Perry: You understood that you could not, under the Arizona law, take a chattel mortgage on stock of merchandise of this Central Auto Supply Company?

Mr. Craig: I object to that, if the Court please.

The Court: Well, if he didn't, Mr. Gust did.

Mr. Perry: All right.

Q. Now, had the Valley National Bank been financing under this Lawrence Warehouse plan for some time before this Central Auto Supply transaction? A. Yes.

(Testimony of Austin K. Wildman.)

Q. Somewhat along the same lines?

A. Yes.

Q. And you considered this loan or these loans to the Central Auto Supply Company as secured loans, is that right?

A. That is right, and so carried on one of our records.

Q. Upon security of this stock of merchandise as represented by the warehouse receipts that were given to you?

A. We call them warehouse receipt loans.

Q. But back of the warehouse receipts, the security was the stock of merchandise, is that right?

A. Yes.

Mr. Perry: I think that is all.

Redirect Examination

By Mr. Craig:

Q. Mr. Wildman, this form of field warehousing was filed in this transaction and is not an uncommon practice in the commercial world, is it?

A. No, it is used throughout the country.

Mr. Craig: That is all.

Mr. Perry: That is all

(The witness was excused.)

Mr. Craig: Mr. Riley.

WILLIAM J. RILEY

was called as a witness on behalf of the Lawrence Warehouse Company, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Craig:

Q. Will you state your name, please? [124]

A. William J. Riley.

Q. Where do you reside?

A. 38 South Temple Drive, Mesa.

Q. By whom are you employed?

A. Western Auto Supply in Mesa.

Q. Were you ever employed by the Lawrence Warehouse Company? A. Yes, sir.

Q. In what capacity?

A. Warehouse manager at Central Auto Supply.

Q. And in any other capacity at any other place?

A. No.

Q. Now, when were you warehouse manager there?

A. Oh, from along in March, '47, until bankruptcy.

Q. Now, during your term as warehouse manager, Mr. Riley, were you called upon at various times to issue warehouse receipts for commodities placed in custody of the Lawrence Warehouse Company? A. Yes, sir.

Q. And to whom were those warehouse receipts issued?

A. Well, as has been stated before, they were made up weekly unless some stuff had been drawn

(Testimony of William J. Riley.)

then or allowed, and then we would make one out if we were running close to the limit at any time, and take them to the Bank, get the releases signed, and carry on the business. One would go to the Lawrence Warehouse Company at Los Angeles, the Bank would retain one and I would keep one.

Q. Are you talking—the latter part of your answer there, about the releases or about receipts?

A. The releases.

Q. Where did the receipts go?

A. Well, the bank got one of those, the Lawrence Warehouse in Los Angeles got one, the Central Auto Supply got one, and I had one.

Q. Now, referring to Defendant Lawrence Warehouse Company's Exhibit E in evidence, and with your attention particularly directed to the second sheet of that exhibit, being a white copy of a non-negotiable warehouse receipt, and particularly directing your attention to the back of that particular copy, as warehouse manager did you ever require a signature of any person at the place called "The Depositor"? A. Yes, sir.

Q. And what person did you require to affix their signature before the issuance of a receipt?

A. In our file when I went to work they gave me a list of authorized signatures, the three major owners, I believe they were, in the [126] corporation.

Q. Of what corporation?

(Testimony of William J. Riley.)

A. The Central Auto Supply, and any one of those three could sign them.

Q. And did they sign them? A. Yes, sir.

Q. Now, during your term there, Mr. Riley, as warehouse manager, did you ever lock the premises that were designated as those leased by the Lawrence Warehouse Company?

A. Always locked them when there wasn't myself or one other bonded person there.

Q. And when would that take place?

A. Well, when I first went to work there, there was three of us under bond by the Lawrence Warehouse Company and then there would be somebody there except at night. When we left at night it would be locked. Towards the end, I was the only bonded personnel employee, and at that time when I went to lunch I'd have to lock it or bring my lunch with me.

Q. Now, during your term as warehouse manager there, Mr. Riley, by whom were you paid?

A. Lawrence Warehouse.

Q. And during that period did you ever allow any person to enter those premises which were then leased to the Lawrence Warehouse Company without your presence or the presence of some other bonded person? A. No, sir.

Q. Did you ever allow any person to take any of the goods in your warehouse out of there without proper releases or proper instructions?

A. No, they never got them without proper channels.

(Testimony of William J. Riley.)

Q. Who were your superiors in your particular job there, Mr. Riley?

A. Mr. Mitchell and Mr. Jim Sasser.

Q. What was Mr. Saxon's position?

A. He was general manager of the Central Auto Supply.

Q. And what authority did he have over you?

A. Over me?

Q. Yes.

A. Well, he would set things going and never gave me any orders.

Q. Now, what was Mr. Mitchell's capacity?

A. Field representative of the Lawrence Warehouse, or district manager.

Q. Who was Mr. Sasser?

A. He was assistant to Mr. Mitchell. I don't know whether he was just an adviser here or not at the time. He wasn't here very long, I know.

Q. For the Lawrence Warehouse Company?

A. Yes, sir.

Q. And it was Mr. Sasser to whom you referred when I asked you who your immediate superiors were?

A. Yes, sir.

Q. It was Mr. Mitchell and Mr. Sasser?

A. Yes.

Q. Oh, I beg your pardon, I thought it was Saxon.

A. No, sir.

Q. Did you receive from either Mr. Sasser or Mr. Mitchell orders or instructions with respect to what materials should be released from the warehouse?

A. Yes, sir.

(Testimony of William J. Riley.)

Q. And how often did you receive those instructions?

A. Oh, whenever there was any change in instructions.

Q. They advised you as to how you should conduct the warehouse, is that right? A. Yes, sir.

Q. And did you release or let merchandise out of the warehouse only in accord with those instructions? [129] A. Yes, sir.

Q. Mr. Riley, how often did you have occasion to discuss the operation down there with either Mr. Mitchell or Mr. Sasser?

A. Well, they usually came by at least once a week.

Q. They ever come by more frequently than that?

A. Towards the end, yes. Sometimes they would be down there three or four days in a row and might miss a couple of days.

Q. Did you ever call them on the phone or discuss problems with them on the phone?

A. No, they were still around often enough that I could pretty well keep up with them.

Q. With respect to the records that you kept as warehouse manager, did you keep time records of the employees of the Lawrence Warehouse Company there?

A. Yes.

Q. And did you personally check those records when they were turned in for their pay?

A. Yes, sir. I was the one that mailed them to the Los Angeles office.

(Testimony of William J. Riley.)

Q. You mailed them yourself to the Los Angeles office? A. Yes.

Q. And the checks in payment of their wages came from where?

A. From the Los Angeles official office to me.

Q. To you. And did you distribute them to the other employees? A. Yes, sir.

Q. Do you know whether they received any compensation in addition to that from the Central Auto Supply Company?

A. No, but I don't believe that they did.

Mr. Craig: That is all.

Cross-Examination

By Mr. Perry:

Q. Mr. Riley, I understood you to say to Mr. Craig that if—that you never allowed any merchandise out without a proper release. What did you mean by that?

A. I said, through the proper channels, I believe, on that, that I was operating at the order desk, making out the tickets and checking and pricing myself, and the other personnel that was on the counter all the time, was a man on the counter that was bonded also, and we—I saw that my releases were in to the Bank and my warehouse receipts went through.

Q. You don't mean to tell us that if I went in there to buy one item that you had to get any releases from the Bank before you could sell it to me?

(Testimony of William J. Riley.)

A. No, sir; as long as I did not hit the \$2000 mark.

Q. You usually didn't get those releases until the week after the sale had been made, did you?

A. Not necessarily. As it ran, our sales weren't large enough to ever hit the \$2000 mark in any one week while I was there, so I was all right, but if they had of, I would have had to have another release.

Q. But you never did? A. That is right.

Q. So if I came in there and bought an item on Monday, you didn't get a release from the Bank for it until the following Saturday, did you?

A. That is right.

Mr. Perry: That is all.

Redirect Examiation

By Mr. Craig:

Q. Actually, what you got from the Bank was a confirmation of delivery, wasn't it, Mr. Riley?

A. Yes, authorizing delivery of that.

Q. Yes. [132] A. Yes, sir.

Q. And actually your instructions were to release commodities up to a certain value, is that right? A. Yes, sir.

Q. And that was given before you released the commodities, isn't that right? A. Yes, sir.

Q. And when you reached that point you stopped delivering? A. Yes, sir.

Q. Until you had further confirmation of delivery from the Bank in order to release further goods?

A. Yes, sir.

(Testimony of William J. Riley.)

Q. Is that right? A. Yes, sir.

Mr. Craig: That is all.

Recross-Examination

By Mr. Perry:

Q. You never did stop delivering, did you?

A. Yes.

Q. When was that? I mean prior to bankruptcy?

A. About three weeks prior to that I closed the gates. [133]

Q. For how long? A. One forenoon.

Q. Is that the only time? A. I think it is.

Q. What was the reason for that?

A. No money, overdrawn.

Q. But it wasn't because you had sold over the amount of the inventory? A. No, sir.

Q. That never did happen?

A. No, sir. It was when I took my delivery receipts to the Bank, there was no check to go with it.

Q. And so you closed down that day?

A. Yes, sir.

Q. Now, on what days did you take these delivery receipts to the Bank?

A. They were delivered on Tuesdays, I believe it was.

Q. For the week's business the week before?

A. Yes, sir.

Mr. Perry: That is all.

(Testimony of William J. Riley.)

Redirect Examination

By Mr. Craig:

Q. Now, on this occasion, Mr. Riley, when you took the delivery receipt to the Bank without any money, they would not authorize you to release any more goods, is that right? A. That is right.

Q. And that is why you would not, that is why you closed it up? A. Yes, sir.

Q. Did you reopen before you got any further authority? A. No, sir.

Mr. Craig: That is all.

Mr. Perry: That is all.

(The witness was excused.)

Mr. Craig: The defendants rest.

Mr. Perry: The plaintiff rests.

The Court: Do you want to submit this on briefs?

Mr. Perry: I think so, if the Court please.

The Court: All right, how much time would you like?

Mr. Craig: Well, we have a short memorandum right here, if the Court please, if you care to have it.

The Court: All right, give it to the Clerk. Well, that is your reply then to their opening?

Mr. Perry: Very well, your Honor. I have got so many briefs, may I have 20 days on that? [135]

The Court: Yes.

Mr. Craig: We have ten after that?

The Court: Yes.

(Thereupon the trial ended at 2:25 o'clock,
P.M. of the same day.) [136]

I hereby certify that the proceedings had upon the trial of the foregoing cause are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing 136 typewritten pages constitute a full, true and accurate transcript of said shorthand record.

/s/ LOUIS L. BILLAR,
Official Reporter.

[Endorsed]: Filed February 24, 1950.

CLERK'S CERTIFICATE TO RECORD ON APPEAL

United States of America,
District of Arizona—ss:

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Ralph Barry, as Trustee in Bankruptcy, of Central Auto Supply Company, a corporation, Bankrupt, Plaintiff, vs. Lawrence Warehouse Company, a corporation, and The Valley National Bank of Phoenix, a national banking association, Defendants, numbered Civ-1102 Phoenix, on the Docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that said original documents, and said copies of the minute entries, constitute the entire record on appeal in said case as designated in the Appellant's Designation filed therein and made a part of the record attached hereto, and the same are as follows, to wit:

1. Complaint filed September 19, 1947.
2. Answer to complaint (Lawrence Warehouse Company) filed October 15, 1947.
3. Answer of defendant The Valley National Bank of Phoenix, filed October 15, 1947.
4. Plaintiff's Exhibit No. 1 in evidence (leases) admitted and filed March 17, 1949.
5. Plaintiff's Exhibit No. 2 in evidence (deposition of Harry Stack) admitted and filed March 17, 1949.
6. Plaintiff's Exhibit No. 3 in evidence (deposition of C. D. Cadot) admitted and filed March 17, 1949.
7. Plaintiff's Exhibit No. 4 in evidence (deposition of Paul S. Godber) admitted and filed March 17, 1949.
8. Plaintiff's Exhibit 5 in evidence (deposition of J. C. Baldwin) admitted and filed March 17, 1949.

9. Plaintiff's Exhibit No. 6 in evidence (deposition of E. R. Tolfree) admitted and filed March 17, 1949.

10. Plaintiff's Exhibit No. 7 in evidence (deposition of F. A. Warburton) admitted and filed March 17, 1949.

11. Plaintiff's Exhibit No. 8 in evidence (deposition of M. Blackburn) admitted and filed March 17, 1949.

12. Plaintiff's Exhibit No. 9 in evidence (deposition of David Shapiro) admitted and filed March 17, 1949.

13. Plaintiff's Exhibit No. 10 in evidence (deposition of F. C. Westphal) admitted and filed March 17, 1949.

14. Defendant Lawrence Warehouse Company's Exhibit A in evidence (group of photographs) admitted and filed March 17, 1949.

15. Defendant Lawrence Warehouse Company's Exhibit E in evidence (warehouse receipts) admitted and filed March 17, 1949.

16. Defendant Lawrence Warehouse Company's Exhibit F in evidence (confirmation of delivery sheet) admitted and filed March 17, 1949.

17. All minute orders entered on or after March 17, 1949, to wit:

17-a. Minute entry of March 17, 1949 (proceedings of trial).

17-b. Minute entry of October 5, 1949 (order of submission).

17-c. Minute entry of November 3, 1949 (order that defendants have judgment).

17-d. Minute entry of February 23, 1950 (order denying Plaintiff's Motion for New Trial, docketed February 23, 1950).

18. Defendant's proposed findings of fact, conclusions of law and judgment filed December 13, 1949, signed by trial judge, and refiled and docketed January 17, 1950.

19. Plaintiff's objections to findings of fact and conclusions of law proposed by defendants, filed December 16, 1949.

20. Plaintiff's motion for a new trial, filed January 19, 1950.

21. Reporter's transcript filed February 24, 1950.

22. Plaintiff's notice of appeal, filed February 27, 1950.

23. Statement of points upon which plaintiff intends to rely upon his appeal filed February 28, 1950.

24. Plaintiff's Designation of Contents of Record on Appeal, filed February 28, 1950.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$4.40 and that said sum has been paid to me by counsel for the appellants.

Witness my hand and the seal of said Court this 24th day of March, 1950.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 12515. United States Court of Appeals for the Ninth Circuit. Ralph Barry, as Trustee in Bankruptcy of Central Auto Supply Company, a corporation, bankrupt, Appellant, vs. Lawrence Warehouse Company, a corporation, and The Valley National Bank of Phoenix, a National Banking Association, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed March 29, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

No. 12515

RALPH BARRY, as Trustee in Bankruptcy of
CENTRAL AUTO SUPPLY COMPANY, a
Corporation, Bankrupt,

Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY, a Cor-
poration, and THE VALLEY NATIONAL
BANK OF PHOENIX, a National Banking
Association,

Appellees.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD TO BE
PRINTED.

Statement of Points

Appellant intends to rely upon his appeal herein upon the points set forth in his "Statement of Points Upon Which Plaintiff Intends to Rely Upon His Appeal," filed by him in the United States District Court for the District of Arizona February 28, 1950 (to which Reference is hereby made), and included in the record transmitted by the Clerk of the United States District Court for the District of Arizona to the Clerk of the United States Court of Appeals for the Ninth Circuit.

Designation of Record to be Printed

Appellant designates for printing herein the following portions of the record:

1. The complaint filed September 19, 1947.
2. Answer to complaint (Lawrence Warehouse Company) filed October 15, 1947.
3. Answer of defendant The Valley National Bank of Phoenix, filed October 15, 1947.
4. Plaintiff's Exhibit No. 1 in evidence (leases) omitting therefrom, however, any plats which are duplicates of the plat first thereto attached.
5. Plaintiff's Exhibit No. 2 in evidence (deposition of Harry Stack), omitting therefrom, however, everything except the questions propounded to the witness and his answers thereto.
6. Plaintiff's Exhibit No. 3 in evidence (deposition of C. D. Cadot), omitting therefrom, however, everything except the questions propounded to the witness and his answers thereto.
7. Plaintiff's Exhibit No. 4 in evidence (deposition of Paul S. Godber), omitting therefrom, however, everything except the questions propounded to the witness and his answers thereto.
8. Plaintiff's Exhibit No. 5 in evidence (deposition of J. C. Baldwin), omitting therefrom, however, everything except the questions propounded to the witness and his answers thereto.
9. Plaintiff's Exhibit No. 6 in evidence (deposition of E. R. Tolfree), omitting therefrom, however, everything except the questions propounded to the witness and his answers thereto.

10. Plaintiff's Exhibit No. 7 in evidence (deposition of F. A. Warburton), omitting therefrom, however, everything except the questions propounded to the witness and his answers thereto.

11. Plaintiff's Exhibit No. 8 in evidence (deposition of M. Blackburn), omitting therefrom, however, everything except the questions propounded to the witness and his answers thereto.

12. Plaintiff's Exhibit No. 9 in evidence (deposition of David Shapiro), omitting therefrom, however, everything except the questions propounded to the witness and his answers thereto.

13. Plaintiff's Exhibit No. 10 in evidence (deposition of F. C. Westphal), omitting therefrom, however, everything except the questions propounded to the witness and his answers thereto.

14. The original only of defendant Lawrence Warehouse Company's Exhibit E in evidence (warehouse receipts). Do not print the second, third and fourth copies—only the original.

15. The original only of defendant Lawrence Warehouse Company's Exhibit F in evidence (confirmation of delivery sheet). Do not print the second and third copies—only the original.

16. Minute order of March 17, 1949.

17. Minute order of October 5, 1949.

18. Minute order of November 3, 1949.

19. Minute order of February 23, 1950.

20. Defendant's proposed findings of fact, conclusions of law and judgment filed December 13, 1949, signed by trial judge, and refiled January 17, 1950.

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25. Statement of points upon which plaintiff intends to rely upon his appeal filed February 28, 1950.

26. Designation of contents of record on appeal, filed February 28, 1950.

/s/ ALLAN K. PERRY,

Attorney for Appellee.

On the 25th day of March, 1950, I mailed a true and correct copy of the foregoing document to counsel for appellees, viz. one copy thereof to Fennemore, Craig, Allen & Bledsoe, Phoenix National Bank Building, Phoenix, Arizona, and one copy thereof to Gust, Rosenfeld, Divelbess, Robinette & Linton, Security Building, Phoenix, Arizona.

/s/ ALLAN K. PERRY.

[Endorsed]: Filed March 29, 1950.

No. 12515

United States
Court of Appeals
For the Ninth Circuit

RALPH BARRY, as Trustee in Bankruptcy of CENTRAL AUTO SUPPLY COMPANY, a corporation, Bankrupt,
Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation, and THE VALLEY NATIONAL BANK OF PHOENIX, a national banking association,
Appellees.

Opening Brief of Appellant

ALLAN K. PERRY,
309 First National Bank Bldg.,
Phoenix, Arizona,
Attorney for Appellant.

FILED

MAY 2 1950

J. P. O'BRIEN,

CLERK

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United States
Court of Appeals

For the Ninth Circuit

RALPH BARRY, as Trustee in Bankruptcy of CENTRAL AUTO SUPPLY COMPANY, a corporation, Bankrupt,
Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation, and THE VALLEY NATIONAL BANK OF PHOENIX, a national banking association,
Appellees.

No. 12515

Opening Brief of Appellant

STATEMENT RELATIVE TO JURISDICTION

This is an action by a Trustee in Bankruptcy, to avoid an alleged illegal transfer of the bankrupt's personalty and to recover possession thereof for the benefit of general creditors. The District Court had jurisdiction under Section 70(e)(3) of the Bankruptcy Act, 11 U. S. C. Chapter 7, Section 110(e).

The appeal is from a judgment of the District Court adverse to the plaintiff-trustee. The Court of Appeals has jurisdiction under Section 1291, Title 28 U. S. C.

While other matters are assigned as error, the principal question to be determined upon the appeal, as it appears to appellant, is:

Does the judgment of the District Court erroneously nullify Section 62-522 of the Arizona Code of 1939, which reads:

“Chattel mortgage of merchant's stock void.—
A mortgage, deed of trust or any other form of lien attempted to be given by the owner of a stock of goods, wares or merchandise daily exposed to sale, in parcels, in the regular course of the business of such merchandise, and contemplating a continuance of possession of said goods and control of said business, by sale of said goods by said owner, shall be deemed fraudulent and void.”

STATEMENT OF THE CASE

With the permission of the court, the parties will be referred to here by name or as they appeared in the court below, i.e., appellant as plaintiff and the appellees as defendants.

As will be observed from the transcript of record, the pleadings, evidence, findings and conclusion are somewhat voluminous, although there is little or no factual dispute.

In order to succinctly state the legal controversy between the parties, plaintiff believes it may be fair to state that his action challenges the validity (as being

repugnant to Section 62-522 of the Arizona Code of 1939) of a plan of "field warehousing" attempted, prior to bankruptcy, by the bankrupt corporation, one of its creditors (Valley National Bank of Phoenix) and the other defendant Lawrence Warehouse Company.

Defendants contend that such plan of "field warehousing" finds sanction in the Uniform Warehouse Receipts Act (Chapter 52, Article 8, Arizona Code of 1939) and is in all respects valid.

If such plan, and the operations of the parties thereunder, are lawful, then the judgment appealed from is correct and should be affirmed. If not, plaintiff, as trustee in bankruptcy of the bankrupt corporation, is entitled to the possession of the goods in controversy, for the benefit of the general creditors of the bankrupt under the provisions of Section 70 of the Bankruptcy Act.

The "field warehousing" arrangement, as disclosed by the evidence, is simply this:

Central Auto Supply Company, a retail dealer in merchandise, executed a lease of a portion of its showroom and warehouse to Lawrence Warehouse Company (Tr 40-46).

The warehouse company erected partitions or wire fences along the lines of such leased portion of the building, as shown upon a blueprint thereof, which blueprint is attached to and made a part of the lease (Tr 47; 93) and also posted signs, advising those who

visited the premises that everything behind such partitions or fences was under the control of the warehouse company.

Central Auto Supply and Lawrence Warehouse Company also executed a document denominated "Field Warehouse Storage Agreement", contemplating the storage of the supply company's goods and merchandise in that portion of its showroom and warehouse which it had previously leased to the warehouse company (Tr 63-68).

The supply company then bought merchandise on credit from wholesalers, jobbers and manufacturers all over the country (who did not see the signs or the fence or have any information or knowledge concerning the "field warehousing" arrangement) who shipped goods directly to the supply company (Tr 120-148).

As soon as such goods were received by the supply company, it put them behind the fence and the warehouse company issued a non-negotiable warehouse receipt for them to the bank. The bank loaned money to the supply company upon the security of such receipt, (Tr 97-98; 169) although the bank knew that the supply company was buying the goods on open account and not paying for them. (Tr 222-223).

The warehouse company had employees on the premises at all times. These employees were paid by the warehouse company, who was reimbursed therefor by the supply company (Tr 82). Most of such em-

ployees had been in the employ of the supply company until the "field warehousing" arrangement was worked out. (Tr 191-192).

Several of the witnesses testified as to how sales to customers of the supply company were handled, and there is little, if any, conflict in the testimony in that respect. Plaintiff took the deposition of C. W. Saxon, former manager of the supply company (Tr 178) and defendants introduced such deposition in evidence (Tr 151). To plaintiff, it seems to be fairly in line with the testimony of the other witnesses as to the manner in which sales to customers of the supply company were conducted after the "field warehousing" arrangement went into effect, and he, therefore, quotes from it as follows:

"Q. Now with respect to the portion of the property that you used, was some of that divided off by wire partitions?

"A. Yes, sir, it was. . . .

"Q. Mr. Saxon, I show you a document that is marked Plaintiff's Exhibit A consisting of three pages, the last one being a blueprint, and the blueprint itself being marked Exhibit A, Lawrence Warehouse Company, Phoenix, Arizona, Arizona Warehouse Number 21, and ask you if that fairly and accurately represents the premises you have been describing and if the red lines denote the partitions that you have mentioned.

"A. That is right.

"Q. Now, during the period that you were manager there will you describe to us how sales

were made by you, where the goods or property sold were within the partitions shown within the red lines on the exhibit I have handed you?

“A. In other words—

“Q. Just what was done, how it was handled?

“A. About 80 per cent of our business, of course, was sold out the back door or was delivered by a delivery boy. There were some sales over the counter, but the majority of the sales in our particular type of business come in over an order desk. A man fills the order out of the storeroom, and he is in charge of the delivery boy who then makes the delivery. As far as the counter sales are concerned, some sales go out over the counter, and even some sales that would be made up from our order desk in the rear would be picked up at the counter by the customer. Now we had—the setup in the plant was that we had an order desk man on full time and a counter man on full time, and sometimes we had during part of that period, we had as high as two and three counter men and assistant order desk men.

“Q. And did you have any stock down there that was not within these partitions that are shown here?

“A. Yes, we did have. We had considerable stock of wire and such in the carburetor and electrical section. However, if I am getting this correctly, that was never carried under Lawrence inventory. The only thing outside that we had would be items that were in display.

“Q. Well, on a sale of items that were not within the Lawrence inventory, was that treated

any differently as far as handling it was concerned than a sale of items that were within the Lawrence inventory? . . .

“A. Well, yes, to a certain extent. For example, in the sale of rebuilt motors, which was the largest amount of sales we had—when I said 80 percent of the sales were out the back door, I am speaking of sales out of the warehouse. We did make certain sales out of our shop handled in an entirely different manner than the sales out of the warehouse. We had a man on the order desk that was the warehouse manager. We were constantly taking parts from the warehouse into the shop. Now of course, those were charged out of Lawrence by the Lawrence Warehouse manager, but the sale was consummated on an entirely different type of ticket. That would be the greatest deviation from regular sales that we had. . . .

“Q. I see. Now if a customer came in to buy an item that was within the Lawrence inventory as you have mentioned, just tell us how that transaction would be handled.

“A. For example a counter sale?

“Q. A counter sale.

“A. Well, the customer would come in—do you want all the mechanics of the sale?

“Q. Yes.

“A. A customer would come in, approach the counter, and would tell the counter man what it is he wanted. Now the counter man would go to stock, into the stockroom, bring out the parts and make out the counter ticket in triplicate, and made

the ticket up according to the parts that were sold, the proper discounts, and actually handled it even down to receiving the money for the same, and in many cases, in some cases it was sent to the Cashier.

“Q. The counter man, was that an employee of the Central Auto Sales or the Lawrence Warehouse?

“A. The counter man was a regular Lawrence Warehouse man.

“Q. A Lawrence Warehouse man?

“A. That is right.

“Q. Did you have anyone in your firm that made sales direct?

“A. Yes, we did, although we were the—we were set up in this manner, we would not make any sales at any time unless a Lawrence Warehouse man was present. So for that reason we had to stagger the shifts of the Lawrence employees so when we were down where we had a few employees we would either have an order desk man in there or the Lawrence Warehouse man, but we did attempt one time to—and didn’t meet with much success, I may say—of attempting to get Lawrence to allow us to make sales even though their man wasn’t present because it was getting to the point we were losing a considerable amount of money and couldn’t maintain a large group of personnel, so they did say we could make sales, which I made several of and you will find in the recap of sales tickets, people’s initials on there who were not Lawrence men, but they wouldn’t definitely let us

make any sales unless a Lawrence man was there.

“Q. Was that common practice for you or someone else to make sales out of your stock, that was not an employee of the Warehouse Company?

“A. Yes, if a Lawrence employee was present.

“Q. Was there any change in the procedure during the time you were there as manager?

“A. Do you mean in sales procedure?

“Q. Yes.

“A. Well, about the only change of any magnitude was that when I came with the company they had no salesmen at all, that is, outside salesmen, and we did build up a small sales force, but as far as the ticket handling and everything, there were no changes made that way.

“Q. You referred to sales out the back door, what do you mean by that?

“A. Sales that the customer doesn't appear to buy merchandise but makes a phone call. For example, a man has a garage, and he is by himself in the garage. He can't close his garage to come in town. He calls in. That would be most of the orders that we sold. He would call in and call the order desk. The order desk was presided over by the warehouse manager. He would get the call and either he himself, or we did have from time to time until we finally got down to absolute rock bottom, assistants who worked under him, who were also on Lawrence, who would make the orders out, and the order desk man would make out the tickets and the delivery boy deliver them.

“Q. Who got the money?

“A. The money was regular billing form where they have sales that came back in over the order desk, and it was filled at the end of the month.

“Q. In the first instance a purchaser making a purchase there, would that remittance go to your company or the Lawrence Warehouse Company, do you understand what I mean?

“A. I think I do.

“Q. If for example, I went in and bought \$5 worth of stuff and gave a check for it, would that go to the Central Auto Sales or to the Lawrence Warehouse Company?

“A. The check itself—there is a couple of ways we can approach this, I hope I can make this clear. All billing naturally was taken—was made payable to Central Auto Supply because we felt that Central Auto Supply was in the business of selling auto parts, not Lawrence Warehouse, even though they had control of them. We did at the same time—I might say that most of the money or a great share of the money that came in as the result of those sales had to in turn be paid out for Lawrence payrolls and also for—depending on what our loan was at the bank, to keep our loan more or less even with them.

“Q. In the first instance, however, the purchaser paid the money to Central Auto?

“A. The billing was made out that way.

“Q. The actual remittance was received that way?

“A. Yes.” (Tr 180-186).

“Q. Now, distinguishing between the Central Auto Supply employees and the Lawrence Warehouse employees, would the Central Auto Supply Company employees have access to the merchandise?

“A. During working hours it was open, the place was open. We had access, we weren't kept out of there, no.

“Q. Would one of your employees as distinguished from the Lawrence Warehouse Company go in and get items of merchandise and take them out?

“A. That would happen, for example, when, say one of our employees might be assisting the regular counter man in making sales.

“Q. Independently of that would it happen?

“A. They all went over the counter, everything that went out of the back door was presided over by the warehouse manager and everything over the counter by the counter man.

“Q. Assume that I had ordered something over the telephone from you and it was delivered to me in the way you have detailed here, would there be anything to indicate to me that I was purchasing property of the Lawrence Warehouse Company?

“A. To indicate that you were purchasing property of the Lawrence Warehouse Company?

“Q. Yes.

“MR. RAY: I object to the question, it presumes a fact not in evidence that this was the

property of the Lawrence Warehouse Company, or that the Lawrence Warehouse Company claimed it to be its property.

“MR. PERRY: I think on that I will just withdraw the question.” (Tr 188-190).

Robert E. Kersting, former President of Central Auto Supply Company stated:

“Q. And after the execution of this lease, you just tell the Court how the business was operated with reference to what your Company did, and what the Lawrence Warehouse Company did, so we will have a picture of how the operations were conducted.

“A. Well, just a small prologue, and not to take up the time of the Court or anything, but we were in certain financial difficulties due, mainly, to the strike of our major suppliers, the Seal Power Corporation. This Company was responsible for a little over 50 per cent of the volume of our sales. They went on strike and remained on strike for eight months. We took no deliveries and that explains our financial stress, and we went first, I believe to the Valley National Bank in the hopes of getting some type or some form of financing that would help carry us through this strike period, for, of course, we had no idea it would last for seven or eight months, we hoped it would be over in two or three weeks. I don't know exactly how it came about, but at least in cooperation with the Valley Bank and the Lawrence Warehouse Company, a Lawrence field

warehouse application was necessitated, which you have just introduced in evidence here. My understanding of that operation was roughly this: I don't claim to be an authority on the technical parts of it, but we had certain inventories, certain merchandise in the shop at the time. In order to increase our volume we wanted to increase our inventory to more adequately compete with the other plants in the area here. The bank and the Lawrence Warehouse showed us that if they could control a certain portion of our building, a certain portion of our inventory; that is, the portion of the building which would contain our inventory, and through some operation of some type of warehouse receipt, if we would pledge that inventory that was already there and then also the new inventory as it came in, that is, as it was purchased from our distributors, and if we allowed them to keep complete control of that inventory as to what came in and what went out, the Valley Bank then would lend us a certain sum of money, a certain percentage on the cost value of that inventory as against these warehouse receipts or whatever they were, whatever we wanted to technically call them. The percentage of the loan from the Valley Bank, I believe, ran somewhere between 50 and 60 per cent. It varied up and down for a time, and we, of course, the unfortunate part of it was, we never knew what it was going to be. The next morning it would be cut down to 10 per cent, and we could be out of business by having to immediately pay the Bank that amount. As our inventory came in

and came in higher, of course, we were entitled, technically, to more money, more of a loan on that pledged inventory to the Bank. As I understood it, the warehouse system was merely the middle man to control and check on that inventory and see what happened to it, supposedly, and the Bank, in turn loaned us money on what was pledged.

“Q. Now, the portion of your warehouse or storeroom, or whatever it was that was leased to the Lawrence Warehouse Company as shown in the red lines on the pledge I showed you a few moments ago, how was that separated from the balance of the building?

“A. Either by walls or built over wire gauging similar to chicken wire, and at the close of business each day it was more or less self contained in this chicken wire, in some cases by folding doors which could be folded shut and then locked with a padlock.

“Q. Now, was there any portion of your stock of merchandise that was offered for sale that was not contained within this area that was enclosed by chicken wire or walls or the area that is shown on the plat in red?

“A. Yes. For a time there was a small portion of it in a smaller building next to the main building known as the carburetor and electrical shop. There was a certain inventory kept in there that was not in the warehouse system, and also there was our larger machine shop in the rear which was not contained in the warehouse, and there were certain parts out there at all times, of course, of considerable value.

“Q. In percentage, would you say that the greater portion of your stock was within this enclosure that you mentioned?

“A. I'd say at least 90 per cent, possibly more than that.

“Q. At all times?

“A. At all times.

“Q. Now, will you just tell the court, assuming that a purchaser came in to buy an item while this arrangement was in effect, what the operations were that resulted in the sale and delivery to him of whatever he wanted to purchase?

“A. If a purchaser came in the front door, you mean, in person?

“Q. Yes.

“A. In this case? Well, he would walk up to the counter and he would ask for gasket for a Model A Ford, which we never had, and the man at the counter would go back to the stock and withdraw that gasket for a Model A Ford and bring it out to him and ask him whether it was charge or cash. If it was cash, he would pay his \$2.28 in cash and get a ticket. On the ticket, which would be a Central Auto Supply invoice, it would show 'One Gasket, \$2.28, paid.'

“Q. This is a cash sale?

“A. This is a cash sale, yes. The counter man would take the money and give it to the Cashier and she would ring it up as cash. If it were a credit sale the same thing would happen except the money would not be transferred, would be written up on the invoice as a charge to a certain

company, and the customers would sign for the charge. Now, that was the outside part of it. Now, you want—

“Q. Go right ahead.

“A. The inside part?

“Q. Yes.

“A. Then, operating under the Lawrence System, and again, now, I am just speaking from the association I had there from what I saw and what I know. Now, there might be some technical parts I am not right on or don't know about, because it was a little complicated, I will grant you that. As I understood it, that counter man would then take his tickets, whether they were charge or cash tickets, and I mean by 'tickets,' the invoices here, and give them to our office girl, and she would process them during that day or at the end of the day, or during the next day. We usually were two or three days behind with them as any business is, and in processing them she would by some kind of a list or recording method, would note the number of units that were allowed, the units being, just for instance, a gasket, as I said, would be one unit, or a box of tools might be another unit, some type of unit designation, and would cost the tickets. Now, whether the office girl did this costing or whether the order desk man or a Lawrence employee did it, I am not too clear on that, but somebody at least in the organization did cost them, arrive at our cost figure from catalogues, and so on.

“Q. Who handled the money, assuming I went in there and bought a gasket for \$2.28, what became of that \$2.28?

“A. The cashier would handle the money and put it in the cash register.

“Q. Well, would that be the Central Auto Supply or the Lawrence Warehouse, is what I am trying to get at?

“A. It would be the Central Auto Supply.

“Q. Then what became of that money?

“A. Well, the money was deposited in the bank account of the Central Auto Supply, or in some cases was used for paid-outs, small cash paid-outs, but it was used as any normal business would use the money.

“Q. Do you know whether the Lawrence Warehouse employees had anything at all to do with the money that came in?

“A. Well, yes, in certain instances they would receive the money. In other words, generally the counter man, the head counter man, would be, at least, the Lawrence Warehouse employee. He would take the money of the cash sale from the customer and then give it to our cashier through a little cage.

“Q. And your cashier saw that it went into the bank to your account?

“A. That is correct.

“Q. And you had it for any expenses that you had in the business, the expenses or the payment of the indebtedness to the Valley Bank or anything else?

“A. Any place it could be used, yes, that is correct.

“Q. I wish you would give the Court one more illustration, Mr. Kersting. Supposing you were buying from a distributor on an open account and the distributor shipped goods to you on an open account, how, then, were those goods handled? In other words, what I am trying to get at is, did that go into the Lawrence Warehouse inventory and warehouse receipts issued against them.

“A. That is correct, yes, they were handled like any—I mean, whether we paid cash for goods that came in or whether they came in on credit, they still went right into the Lawrence Warehouse System.

“Q. In other words, if a distributor sold you goods on credit, then am I correct, that as soon as those goods arrived and before they had been paid for by you, they were placed in this inventory and the Lawrence Warehouse Company issued its warehouse receipt to the Valley Bank for that?

“A. Well, the first part of your question, yes, they were immediately put in the inventory and we, within due course of processing, as rapidly as possible reported them as entering the inventory, and then they were used, yes, as a credit, or sooner or later placed on some type of warehouse receipt.

“Q. Regardless of whether they had been paid for in cash or whether you had them on credit?

“A. That is right.” (Tr 90-97).

The bank regarded its loans to the supply company as "secured", the security being the stock of merchandise (Tr 224).

Judgment was entered in favor of the defendants (Tr 21), motion for new trial (Tr 27) was denied (Tr 18) and the plaintiff has appealed (Tr 28), it being his contention that the entire scheme of "field warehousing", as disclosed by the record, is contrary to Section 522 of the Arizona Code of 1939, and that the judgment appealed from permits the defendants to accomplish by indirection that which is specifically prohibited by the statute of a sovereign state. The statute forbids a pledge of merchandise daily offered for sale; but the "field warehousing" arrangement under the judgment here for review permits the parties to do that very thing, and to give the bank a preference in the payment of its claim over substantially all of the other creditors of the bankrupt corporation.

SPECIFICATION OF ERRORS

1. The District Court erred in rendering judgment in favor of the defendants and against the plaintiff, because such judgment is not justified by the evidence and is contrary to law.

2. The District Court erred in failing and refusing to make adequate findings of fact upon the issues presented by the pleadings.

3. The District Court erred in adopting the findings of fact proposed by the defendant Lawrence Warehouse Company and signed by the District Judge, as such findings do not warrant the conclusions of law so made and signed and do not support the judgment.

4. The District Court erred in making its finding of fact number I, to-wit:

“Long prior to filing its petition in bankruptcy Central Auto Supply Company transferred to Lawrence Warehouse Company for deposit certain goods, wares and merchandise.” (Tr 19).

for the reason that there is no evidence to support such finding.

5. The District Court erred in making its finding of fact number II, to-wit:

“Said goods, wares and merchandise were deposited in the field warehouse of Lawrence Warehouse Company theretofore leased by it from Cen-

tral Auto Supply Company, and remained in the possession and control of the said Lawrence Warehouse Company thereafter.” (Tr 19).

for the reason that there is no evidence to support such finding.

6. The District Court erred in making its finding of fact number III, to-wit:

“At the time said goods, wares and merchandise were deposited with the said Lawrence Warehouse Company, that company issued certain uniform non-negotiable warehouse receipts at the direction of the depositor, Central Auto Supply Company and in favor of the Valley National Bank, Phoenix, a national banking association.” (Tr 19-20).

for the reason that there is no evidence to support such finding.

7. The District Court erred in making its finding of fact number IV, to-wit:

“Said uniform non-negotiable warehouse receipts were held by said bank as security for a loan in favor of Central Auto Supply Company.” (Tr 20).

for the reason that there is no evidence to support such finding.

8. The District Court erred in making its finding of fact number V, to-wit:

“Said transactions were in conformity with the usual commercial practice known as field warehousing.” (Tr 20).

for the reason that there is no evidence to support such finding, and for the further reason that such purported finding of fact is wholly immaterial to the issues presented to the trial court.

9. The District Court erred in its conclusion of law number 1, viz:

“The field warehouse lease between Central Auto Supply Company as lessor, and Lawrence Warehouse Company as lessee, dated July 30, 1946, was a valid existing contract between the parties thereto. The field warehouse storage agreement dated July 26, 1946, was a valid existing contract between the parties thereto. The pledge and warehousing agreement dated July 30, 1946, was a valid existing contract between the parties thereto. The field warehouse lease dated March 17, 1947, was a valid existing contract between the parties thereto. The field warehouse storage agreement dated May 23, 1947, was a valid existing contract between the parties thereto. The pledge and warehousing agreement dated March 17, 1947, was a valid existing contract between the parties thereto.” (Tr 20).

because the same is contrary to the law applicable to the factual situation presented by the evidence.

10. The District Court erred in its conclusion of law number II, viz:

“The non-negotiable warehouse receipts issued by Lawrence Warehouse Company at the direction of the depositor, Central Auto Supply Company, in favor of the Valley National Bank, Phoenix, a national banking association, were valid warehouse receipts within the Arizona Uniform Warehouse Receipts Act, being Sections 52-801 through 52-849, Arizona Code 1939.” (Tr 21).

because the same is contrary to the law applicable to the factual situation presented by the evidence.

11. The District Court erred in its conclusion of law number III, viz:

“The pledge of the non-negotiable warehouse receipts and the pledge of such goods, wares and merchandise deposited with Lawrence Warehouse Company as warehousemen in favor of the Valley National Bank, Phoenix, as security for a loan to the Central Auto Supply Company, was a valid pledge as between the parties thereto and as against the plaintiff herein as trustee in bankruptcy of the Central Auto Supply Company and as against third parties, general creditors or otherwise.” (Tr 21).

because the same is contrary to the law applicable to the factual situation presented by the evidence.

12. The District Court erred in refusing to adopt and settle the finding of fact numbered “2” (as proposed by the plaintiff) viz:

“2. At all times here material, to and until its adjudication as a bankrupt as aforesaid, said

Central Auto Supply Company was engaged in business as a merchant, and maintained its place of business at 601-603 East Adams Street, in Phoenix, Maricopa County, Arizona. At all such times said Central Auto Supply Company was the owner of a stock of goods, wares and merchandise, which it kept and maintained at its place of business aforesaid, and daily exposed the same to sale in parcels in the regular course of its merchandise business aforesaid." (Tr 24).

because such finding of fact is supported by the evidence and is necessary to a proper determination of the action.

13. The District Court erred in refusing to adopt and settle the finding of fact numbered "3" (as proposed by the plaintiff) viz:

"3. For the purpose of attempting to create a lien upon or transfer of interest in said entire stock of goods, wares and merchandise, in violation of the provisions of Section 62-522 of the Arizona Code of 1939, said Lawrence Warehouse Company did, prior to the adjudication of said Central Auto Supply Company as a bankrupt as aforesaid, issue to said The Valley National Bank of Phoenix certain documents in the form of non-negotiable warehouse receipts, wherein and whereby said Lawrence Warehouse Company recited that said stock of goods, wares and merchandise was held by it in storage for said The Valley National Bank of Phoenix as attempted security for loans made by said The Valley National Bank

of Phoenix to said Central Auto Supply Company.” (Tr 24-25).

because such finding of fact is supported by the evidence and is necessary to a proper determination of the action.

14. The District Court erred in refusing to adopt and settle the finding of fact numbered “4” (as proposed by the plaintiff) viz:

“4. At all times thereafter, to and until its adjudication in bankruptcy as aforesaid, said Central Auto Supply Company remained in the actual and physical possession of said goods, wares and merchandise, and had the actual control and merchandising and sale thereof and did actually make daily sales therefrom.” (Tr 25).

because such finding of fact is supported by the evidence and is necessary to a proper determination of the action.

15. The District Court erred in refusing to adopt and settle the finding of fact numbered “5” (as proposed by the plaintiff) viz:

“The amount owing by Central Auto Supply Company to The Valley National Bank of Phoenix, as of the day of the date of its adjudication in bankruptcy herein, was thirty-one thousand one hundred fifty-five and 84/100 dollars, which was reduced by the sum of one hundred ninety-two and 20/100 dollars by the payment to said bank by the receiver of said Central Auto Supply Company of

said sum of one hundred ninety-two and 20/100 dollars leaving a balance owing by said bankrupt corporation to said bank of thirty thousand eight hundred thirty-five and 53/100 dollars." (Tr 25).

because such finding of fact is supported by the evidence and is necessary to a proper determination of the action.

16. The District Court erred in refusing to make the following conclusion of law (plaintiff's requested conclusion number 2):

"The entire scheme of 'field warehousing,' as disclosed by the record, is contrary to and violative of the provisions of section 62-522 of the Arizona Code of 1939; and the lien or pledge of merchandise contemplated by such scheme is void as to general creditors of the bankrupt." (Tr 26).

because such is the law applicable to the factual situation presented by the evidence.

17. The District Court erred in refusing to make the following conclusion of law (plaintiff's requested conclusion number 3):

"The plaintiff herein, as trustee in bankruptcy of Central Auto Supply Company, represents in this action the general creditors of the bankrupt." (Tr 26).

because such is the law applicable to the factual situation presented by the evidence.

18. The District Court erred in refusing to make the following conclusion of law (plaintiff's requested conclusion number 4):

"Section 62-522 of the Arizona Code of 1939 was not repealed or modified, in whole or in part, by implication or otherwise, by the adoption of the uniform warehouse receipt act in Arizona." (Tr. 26).

because such is the law applicable to the factual situation presented by the evidence.

19. The District Court erred in refusing to make the following conclusion of law (plaintiff's requested conclusion number 5):

"The defendants are not, nor is either of them, entitled to the possession of the stock of goods, wares and merchandise, in whole or in part." (Tr. 26).

because such is the law applicable to the factual situation presented by the evidence.

20. The District Court erred in refusing to make the following conclusion of law (plaintiff's requested conclusion number 6):

"The plaintiff is vested with the title to said stock of goods, wares and merchandise, and the whole thereof, and the right of possession thereof, under the provisions of Section 70 of the Act of Congress Relating to Bankruptcy, as amended." (Tr 26).

because such is the law applicable to the factual situation presented by the evidence.

21. The District Court erred in refusing to make the following conclusion of law (plaintiff's requested conclusion number 7):

“Plaintiff is entitled to judgment, as prayed in his complaint.” (Tr 26).

because under the uncontradicted evidence and the applicable law plaintiff is entitled to such relief.

22. The District Court erred in denying the plaintiff's motion for new trial, for the reasons stated in the foregoing specification of errors numbered 1 to 21, inclusive.

SUMMARY OF ARGUMENT

1. The entire scheme of "field warehousing", as disposed by the record, is contrary to Arizona law; and the lien or pledge of merchandise contemplated by such scheme is void as to general creditors of the bankrupt.

2. The trustee represents in this action the general creditors of the bankrupt.

3. Section 62-522 of the Arizona Code of 1939 was not repealed or modified in whole or in part, by implication or otherwise, by the adoption of the Uniform Warehouse Receipts Act.

4. The fact that the Arizona Warehouse Receipts Act is a "uniform statute" does not require that it be given such construction as to render invalid the Arizona "no lien upon merchandise stock" law.

5. The construction placed upon the transaction by the bank, viz. "but back of the warehouse receipts, the security was the stock of merchandise" should be here controlling.

6. The courts of the United States are loath to nullify a state statute, except upon the most cogent of reasons.

ARGUMENT

I.

The Entire Scheme of "Field Warehousing", as Disclosed By The Record, Is Contrary To Arizona Law; And The Lien Or Pledge Of Merchandise Contemplated By Such Scheme Is Void As To General Creditors Of The Bankrupt.

Section 62-522 of the Arizona Code of 1939 reads as follows:

"Chattel mortgage of merchant's stock void.—
A mortgage, deed of trust or any other form of lien attempted to be given by the owner of a stock of goods, wares or merchandise daily exposed to sale, in parcels, in the regular course of the business of such merchandise, and contemplating a continuance of possession of said goods and control of said business, by sale of said goods by said owner, shall be deemed fraudulent and void."

In construing such statute, the Supreme Court of Arizona said:

"We know of no other code with a provision exactly like the one quoted above. . . ."

Hartford Fire Insurance Company v. Jones,
31 Ariz. 8, 250 P. 248, 249.

In denying a motion for re-hearing in that case (31 Ariz. 289, 252 P. 192) the court was careful to point out that one of the objects of the statute was the protection of *creditors* from secret liens or pledges, saying:

“We believe on reconsideration that its purpose was to protect all innocent third parties, whether they be creditors or ordinary purchasers of such merchandise.”

A somewhat similar (though by no means identical) statute was considered by the Court of Appeals for the Ninth Circuit in *In re Convisser*, 6 F. 2d 177, wherein the court, speaking through the late Circuit Judge Rudkin, said:

“Section 2955 of the Civil Code prohibits the mortgage of the stock in trade of a merchant, and section 3440 prohibits the sale, transfer, or assignment in bulk of the stock in trade, or a substantial part thereof, without first giving or recording the notice therein prescribed. The manifest purpose of these provisions was to protect the stock in trade against liens and transfers of every kind for the benefit of general creditors. But, notwithstanding these express statutory prohibitions, the petitioner earnestly insists that a merchant may still pledge the whole, or a substantial part of his stock in trade, because a pledge is not a sale, transfer, or assignment, within the meaning of the law. With this contention we are unable to agree. As already stated, we think it was the plain purpose of the legislature to prohibit liens and transfers of every kind of the merchant's stock in trade, and that the language employed was ample for that purpose.”

A Pennsylvania statute requiring the giving of notice of the assignment of accounts receivable was

under consideration in *Corn Exchange Nat. Bank & T. Co. v. Klauder*, 318 U. S. 434, 63 S. Ct. 679, 87 L. Ed. 884, 144 A. L. R. 1189. There the transaction was called "non-notification financing" (not "field warehousing", as the plan here under consideration is denominated by the defendants) and it was urged that if the law be enforced and the preferential creditor shorn of its illegal security, it would just about break the poor "non-notification financiers". The United States Supreme Court expressed its regret at so disastrous a result, but said:

"The Circuit Court of Appeals has determined, and we accept its conclusion, that at all relevant times it was the law of Pennsylvania, where these transactions took place, that because of the failure of these assignees to give notice to the debtors whose obligations were taken, a subsequent good-faith assignee, giving such notice, would acquire a right superior to theirs. It held that the assignments were preferences under sec. 60(a) and therefore, under the terms of sec. 60(b), inoperative against the trustee.

"This is undoubtedly the effect of a literal reading of the Act. Its apparent command is to test the effectiveness of a transfer, as against the trustee, by the standards which applicable state law would enforce against a good-faith purchaser. Only when such a purchaser is precluded from obtaining superior rights is the trustee so precluded. So long as the transaction is left open to possible intervening rights to such a purchaser, it is vulnerable to the intervening bankruptcy. By

thus postponing the effective time of the transfer, the debt, which is effective when actually made, will be made antecedent to the delayed effective date of the transfer and therefore will be made a preferential transfer in law, although in fact made concurrently with the advance of money. In this case the transfers, good between the parties, had never been perfected as against good-faith purchasers by notice to the debtors as the law required, and so the conclusion follows from this reading of the Act that the petitioners lose their security under the preference prohibition of sec. 60(b).

“Such a construction is capable of harsh results, and it is said that it will seriously hamper the business of ‘non-notification financing,’ of which the present case is an instance. This business is of large magnitude and it is said to be of particular benefit to small and struggling borrowers. Such consequences may, as petitioners argue, be serious, but we find nothing in congressional policy which warrants taking this case out of the letter of the Act. . . .”

Where is there any difference in principle between the cause at bar and the *Klauder* decision?

Here we have a state statute designed to protect creditors against secret liens. We have also an ingenious scheme to thwart that statute and permit a bank to make loans upon a stock of merchandise intended for sale at retail and in the ordinary course of business. We have definite and uncontradicted proof

from the depositions of Harry Stock (Tr 120), C. R. Cadot (Tr 122), Paul S. Godber (Tr 126), J. C. Baldwin (Tr 132), Edward R. Tolfree (Tr 136), Frank A. Warburton, Jr. (Tr 139), M. Blackburn (Tr 142), David Shapiro (Tr 145) and F. C. Westphal (Tr 148) that the manufacturers, wholesalers and jobbers, who were (with the knowledge of Valley National Bank) selling goods to Central Auto Supply upon open account, had neither knowledge nor notice of the "field warehousing" plan under which such goods immediately became secret security for the loans made by Valley National Bank to the supply company.

The judgment of the trial court here upon review approves the plan of "field warehousing". It finds nothing wrong with it from a legal standpoint. It permits all of the stock of merchandise to be taken by a secret lienholder in contravention of the Arizona statute. It says, in effect, that although there is a state statute prohibiting such secret lien, it can be nullified by a paper contract and a row of chicken wire spread out and tacked up along the lines of the bankrupt's show room and warehouse ostensibly leased to the warehouse company. In this connection, the attention of the court is most respectfully invited to the testimony of Robert E. Kersting, found upon pages 92 and 93 of the transcript of record thus:

"Q. Now, the portion of your warehouse or store room, or whatever it was that was leased to the Lawrence Warehouse Company as shown in the red lines on the pledge I showed you a few

moments ago, how was that separated from the balance of the building?

“A. Either by walls or built over wire gauging similar to chicken wire, and at the close of business each day it was more or less self contained in this chicken wire, in some cases by folding doors which could be folded shut and then locked with a padlock.”

In principle, the cause at bar is not wholly dissimilar to that reviewed in *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. Ed. 1117, wherein it is said :

“The method taken to store the property was, as found by the district court, a mere device or subterfuge to enable the bankrupt to hypothecate the receipts, and thus raise money upon secret liens on property in the possession of the pledgor and under its control; and such scheme, the court said, ought not to receive judicial sanction. Such a scheme, under the facts, and as carried out in this case, and with regard to Wisconsin law, was a fraud in fact, and neither the receipts nor the so-called pledge could be asserted against any of the creditors.”

II.

The Trustee Represents In This Action The General Creditors Of The Bankrupt.

As heretofore noted, the Arizona Supreme Court, in *Hartford Fire Insurance Company v. Jones*, 31 Ariz. 289, 252 P. 192, stated definitely that the Arizona statute declaring void all attempted liens upon stock

in trade was enacted "to protect all innocent third parties, whether they be creditors or ordinary purchasers of such merchandise."

The court of Appeals for the Ninth Circuit reached substantially the same conclusion with respect to the California statute in *In re Convisser*, 6 F. 2d 177, stating "The manifest purpose of these provisions was to protect the stock in trade against liens and transfers of every kind, for the benefit of general creditors."

Lest it be suggested that the Trustee stands in the shoes of the bankrupt and cannot, therefore, invoke the Arizona statute, the attention of the court is most respectfully invited to Section 70(c) of the Bankruptcy Act, whereby the Trustee is vested "with all of the rights, remedies and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such creditor actually exists."

In *Hirschfeld v. McKinley*, 78 F. 2d 124, 135, the Court of Appeals for the Ninth Circuit (upon appeal from the District of Arizona) quoted approvingly from 1 Loveland on Bankruptcy, 4th Edition, Section 356, page 734, thus:

"A trustee in bankruptcy represents the general or unsecured creditors, and his duties relate generally to their interests. He represents creditors of the bankrupt at the time the petition is filed, and not prior creditors. He represents all of the unsecured creditors and not any class or group of them."

There can be no question as to the rights of the trustee to maintain, upon behalf of the bankrupt's general creditors, this action to recover the property from those who hold the secret and invalid lien or pledge thereof under the so-called "field warehousing" plan.

III.

Section 62-522 Of The Arizona Code Of 1939 Was Not Repealed Or Modified In Whole Or In Part, By Implication Or Otherwise, By The Adoption Of The Uniform Warehouse Receipts Act.

Section 62-522 of the Arizona Code of 1939 is found as Section 3283 of the Revised Statutes (1901) of the Territory of Arizona. Article 8 of Chapter 52 of the Arizona Code of 1939 (warehouse receipts act) came into being as Chapter 47 of the Arizona Laws of 1921.

Thereafter, both statutes were re-enacted and became effective simultaneously, as a part of Senate Bill No. 100 of the 5th Special Session of the 8th Arizona Legislature, known as the Revised Code of 1928. See Chapter 18, Arizona Laws of 1929.

If, as apparently contended by defendants, the warehouse receipts act repealed or modified the statute voiding liens or pledges of the debtor's stock of merchandise, certainly some direct reference thereto would have been made in the 1928 Code.

The simultaneous re-enactment of both statutes in 1928 clearly demonstrates that the Legislature saw no conflict between them and intended that the law void-

ing liens or pledges of stocks of merchandise should remain in full force and effect.

Southern Pacific Company v. Gila County
56 Ariz. 499, 109 P. 2d 610.

Conway v. State Consolidated Publishing Company, 57 Ariz. 162; 112 P. 2d 218;

Peterson v. Central Arizona Light & Power Company, 56 Ariz. 231; 107 P. 2d 205;

State of Washington v. Maricopa County (9 Cir.) 152 F. 2d 556.

Of course, it is the rule that statutes should be so construed, where possible, as to give effect to every section and provision, and, in the event of an apparent conflict, such statutes should be harmonized where practicable.

Hill v. Gila County, 56 Ariz. 317; 107 P. 2d 377;

Powers v. Isley, 66 Ariz. 94; 183 P. 2d 880.

It is also the rule that repeal by implication is not favored, and will not be indulged if there is any other reasonable construction. This rule is well expressed by the Arizona Supreme Court in *Southern Pacific Company v. Gila County*, 56 Ariz. 499, 109 P. 610, 611, wherein it is said:

“It is not disputed by plaintiff that a statute may be repealed by implication, as well as by direct language, in a subsequent act of the legislature, and that such repeals do frequently occur, but it is also urged, as we have said in *Rowland v. McBride*, 35 Ariz. 511, 281 P. 207, 210:

‘It should also be borne in mind that “repeals by implication are not favored, and will not be indulged, if there is any other reasonable construction.” ’

“When the question of repeal by implication arises, if the later statute and the former can be construed so that both will be operative, it is the duty of the court to give them such a construction. *Biles v. Robey*, 43 Ariz. 276, 30 P. 2d 841. It is only when upon no reasonable construction both can be operative that it is our duty to hold that the later act repeals the former by implication. *Burnside v. School District No. 27*, 33 Ariz. 1, 261 P. 629.”

Nor does it appear to plaintiff that the decision of the California District Court of Appeals, in *Sampsell v. Security-First Natl. Bank*, 207 P. 2d 1088, can be of much help to the defendants upon the question of implied repeal, for there it was urged and determined that the uniform receipts act repealed by implication earlier enactments of the California Legislature upon the “general business of conducting a public warehouse.” Here, in order for the defendants to prevail, they must establish that the Uniform Warehouse Receipts Act repealed by implication the Arizona statutory provision rendering void secret liens on stocks of merchandise. Besides, we are here concerned with the substantive law of Arizona and not that of California, and are bound by the rule set forth in *Bacon v. Texas*, 163 U. S. 207, 16 S. Ct. 1023, 41 L. Ed. 132 (referred to in the decision of the Court of Appeals for the Ninth

Circuit, in *State of Washington v. Maricopa County*, 152 F. 2d 556, 559) to the effect that the question whether a subsequent codification of an existing statute was or was not a mere revision and continuation of existing law, and whether the changed phraseology properly called for a change of construction, *are questions for the state court to determine.*

IV.

The Fact That The Arizona Warehouse Receipts Act Is A "Uniform Statute" Does Not Require That It Be Given Such Construction As To Render Invalid The Arizona "No Lien Upon Merchandise Stock" Law.

Defendants, in their brief presented to the trial court, said:

"The Supreme Court of Arizona has announced an interpretation of the Uniform Warehouse Receipts Act, in relation to local laws, as follows:

" 'Local laws must be interpreted in the light of the desire to make the Uniform Warehouse Receipts Act universal in its application throughout the commercial world.' *S. R. V. W. U. A. v. Peoria Ginning Co.*, 27 Ariz. 145, 231 Pac. 415.

"This question has been adjudicated in the 9th Circuit Court of Appeals in the United States in the case of *Heffron v. Bank of America Natl. Trust & Sav. Assn., et al.*, 113 Fed. (2) 239, holding that the delivery of the goods to a warehouseman upon issuance of receipts and the subsequent

delivery of the receipts as security for a loan was valid as against third persons, including the trustee in bankruptcy. To the same effect is *Union Trust Company v. Wilson*, 198 U. S. 530, 49 L. Ed. 1154, 25 S. Ct. 766.

“In *Sampsell v. Lawrence Warehouse Company*, 167 Fed (2) 885, decided by the 9th Circuit Court of Appeals June 9, 1948, the court again announced the necessity for construing the Uniform Warehouse Receipts Act so as to make uniform the law of the states which have enacted it. That court cites also the case of *Commercial Natl. Bank of New Orleans v. Canal-Louisiana Bank and Trust Co.*, 239 U. S. 520, 36 S. Ct. 194, 60 L. Ed. 417, to the same effect.

“In view of the evidence in this case to the end that possession was in Lawrence Warehouse Company at the time warehouse receipts were issued for the goods and remained there until order of the holder of the warehouse receipts, and in view of the uncontroverted state of the law with respect to the Uniform Warehouse Receipts Act, the statute relied upon by plaintiff cannot apply and judgment must be for the defendants.”

It is submitted that the statement that the goods “remained there until order of the holder of the warehouse receipts” may not be strictly accurate, as appears from the testimony of Kersting and Saxon, previously quoted in the “Statement of the Case” herein; and from the testimony of Austin K. Wildman, former Assistant Cashier and Loan Officer of the Valley

National Bank, it would appear that the goods were released by blanket authorization prior to their actual sale by the supply company. Here is what Wildman says:

“A. Well, to start with, they brought in one receipt covering all of the inventory that had been placed in the Lawrence Warehouse. We made a loan on a certain per cent of that—the value of that inventory that was placed in the Lawrence Warehouse. The arrangement through a written authorization that we gave to the Lawrence Warehouse, they could deliver upon request of the Central Auto Supply, inventory up to a certain dollar amount. When it reached that dollar amount, and I don’t recall what its release provisions were, a release would be prepared on what they called a ‘confirmation of delivery.’ That confirmation of delivery would be brought into the bank; one copy would bear the signature of an officer of the Central Auto Supply, indicating that that merchandise had been delivered to them. They would bring in a check equal to the same percentage that we had loaned on that merchandise. In other words, if it was 65 per cent that we had loaned on it, they would bring in a check for that release, that check to apply to reduce the loan. They would bring in—the Bank would then execute that release when they had received the payment on it. Now, under the authorization given by the Bank of Lawrence, they required that those confirmation of deliveries be submitted at least

once each week. If the commodities delivered reached a certain dollar value before the week was out, they would have to bring them in and get them executed, get the Bank to sign a release before they could deliver more merchandise.

“Q. And at the same time would they be required to bring in a check for the amount covering that?

“A. Yes, that is the way the transaction started out. Now, later on, they would be short of funds, so—and having received additional merchandise they would sometimes bring in another warehouse receipt covering merchandise of a value approximately of what was being released and we would accept that as substitute collateral in place of reducing the loan.

“Q. And under those circumstances you would then also execute a confirmation of delivery and let the Warehouse Company deliver further goods?

“A. Yes, that would be a means of effecting the substitution.

“Q. In other words, they were just paying with more goods for security rather than paying in money?

“A. That is right.

“Q. And Mr. Wildman, with respect to those confirmation of delivery sheets, were they in all cases returned to the Lawrence Warehouse Company?

“A. Those came in to us in triplicate. The original was sent to the Lawrence Warehouse Com-

pany's Los Angeles office, one copy was retained by the Bank for their record, and one copy returned to the Lawrence Warehouse manager at the warehouse.

"Q. Now, throughout these negotiations, Mr. Wildman, and throughout this credit arrangement, did you, on behalf of the Bank, actually deliver to the Lawrence Warehouse instructions with respect to the releasing of these goods?

"A. Yes, that was written instructions, and when there is any change made, we write complete new instructions.

"Q. And were those instructions also delivered to the Central Auto Supply, or were they advised of such instructions?

"A. No, I—those instructions would be written up in triplicate and usually sent to the Lawrence Warehouse Company's office at Los Angeles, although sometimes they would be delivered to Mr. Mitchell or some other Lawrence Warehouse examiner here in Phoenix." (Tr. 215-17).

But, regardless of the strict accuracy or inaccuracy of such statement, it must appear that the defendants are overly optimistic when they attempt to derive comfort from the decisions stating that the warehouse receipts act should be construed uniformly by the several states which have adopted it. Plaintiff has never contended otherwise.

The Bankruptcy Act, too, is a uniform statute, applicable throughout the length and breadth of the United States, yet it has never, so far as plaintiff is

advised, been so interpreted as to permit the creation of a secret lien, denounced by state statute, in favor of one creditor and to the detriment of others.

If defendants' contention is correct, then the various state statutes relating to debtor's exemptions of real and personal property should all be considered as scrapped (instead of given effect as they now are) by the Bankruptcy Act. See *in re Shepardson*, 28 F. 2d 353, 355.

V.

The Construction Placed Upon The Transaction By The Bank viz. "But Back Of The Warehouse Receipts, The Security Was The Stock Of Merchandise" Should Be Here Controlling.

As heretofore demonstrated, the trustee stands in the shoes of an execution creditor.

No negotiable warehouse receipt was issued by Lawrence Warehouse Company to Central Auto Supply or to the Valley National Bank. The receipt was issued directly to the bank and great care was taken by the defendants to establish beyond question that it was non-negotiable in denomination, form and effect.

It stands undisputed in the record that the goods sold upon open account by general creditors of the supply company were immediately delivered by the supply company into the portion of the building leased to Lawrence Warehouse and the warehouse company thereupon issued its non-negotiable receipt to the bank.

If any of the creditors now represented by the plaintiff herein, trustee in bankruptcy for the supply company, had known of the secret arrangement between the parties, a levy by execution or attachment would have been available. Section 52-820 of the Arizona Code of 1939 applies to negotiable warehouse receipts only.

If any of such creditors had known what was happening to the merchandise they shipped to the supply company, certainly they would not have continued to make such shipments. The testimony of the witnesses Stock, Cadot, Godber, et al (Tr 120-150) is clear and uncontradicted in this respect.

VI.

The Courts Of The United States Are Loath To Nullify A State Statute, Except Upon The Most Cogent of Reasons.

The judgment here for review does not determine that the Arizona statute forbidding secret liens on stocks of merchandise is in any way invalid. It simply says, in effect, that it is rendered inoperative when applied to the facts of this case, because of the use of the lease, wire fence and warehouse receipts. It permits the defendants to "get around" the Arizona law through the use of a very clever scheme which they term "field warehousing", contemplating that the "warehouseman" moves into the merchant's place of business, erects some wire fences, posts some signs, issues some non-negotiable warehouse receipts to a lend-

ing agency and thereby creates a lien in favor of the lending agency, so that upon insolvency of the merchant the lending agency grabs all of his stock in trade and leaves his general creditors without remedy. The effectiveness of the Arizona statute is as completely destroyed by such judgment as it would have been had the trial court declared the act repugnant to some provisions of the United States Constitution.

Even if the validity of the Arizona act had been challenged as in contravention of a Federal constitutional provision, such challenge should not have been sustained unless the asserted invalidity of the act were demonstrated beyond all reasonable question.

The rule set forth in the early case of *Butler v. Commonwealth*, 51 U. S. 402, 13 L. Ed. 474, 478 is still effective:

“The high conservative power of the federal government here appealed to is one necessarily involving inquiries of the most delicate character. The States of this Union, consistently with their original sovereign capacity, could recognize no power to control either their rights or obligations, beyond their own sense of duty or the dictates of natural or national law. When, therefore, they have delegated to a common arbiter amongst them the power to question or to countervail their own acts or their own discretion in conceded instances, such instances should fall within the fair and unequivocal limits of the concession made. *Accordingly it has been repeatedly said by this court, that*

to pronounce a law of one of the sovereign states of this union to be a violation of the constitution is a solemn function, demanding the gravest and most deliberate consideration; and that a law of one of the states should never be so denominated, if it can upon any other principle be correctly explained. Indeed, it would seem that, if there could be any course of proceeding more than all others calculated to excite dissatisfaction, to awaken a natural jealousy on the part of the states, and to estrange them from the federal government, it would be the practice, for slight and insufficient causes, of calling on those states to justify, before tribunals in some sense foreign to themselves, their acts of general legislation." (Emphasis supplied.)

CONCLUSION

For the foregoing reasons, it is most respectfully insisted that the judgment of the District Court be reversed.

Respectfully submitted,

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No. 12,515

IN THE

United States Court of Appeals
For the Ninth Circuit

RALPH BARRY, as Trustee in Bankruptcy of Central Auto Supply Company (a corporation, bankrupt),

Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY (a corporation) and THE VALLEY NATIONAL BANK OF PHOENIX (a National Banking Association),

Appellees.

APPELLEES' REPLY BRIEF.

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APPELLEES' REPLY BRIEF.

STATEMENT OF THE CASE.

In that portion of his Opening Brief entitled "Statement Relative to Jurisdiction" Appellant states that the principal question to be determined upon appeal as it appears to Appellant is whether the judgment of the District Court nullifies Section 62-522 of the Arizona Code of 1939 which is thereafter quoted. Thereafter Appellant makes much of the fact that this statute is not identical with similar statutes in other

states, although the identity of its general purpose and intent seems clear.

Thereafter, and under the title "Statement of the Case," Appellant states that his action challenges the validity of the business known as field warehousing.

After these somewhat general statements, we come to that portion of the brief designated as "Specification of Errors," and there Appellant attacks each of the findings of the District Court as having no evidence to support the finding. Curiously enough, Appellant makes no attempt to support his Specification of Errors.

The section of the Arizona Code upon which Appellant relies, reads as follows:

"Chattel Mortgage of Merchant's Stock Void.—A mortgage, deed of trust or any other form of lien attempted to be given by the owner of a stock of goods, wares or merchandise daily exposed to sale, in parcels, in the regular course of the business of such merchandise, *and contemplating a continuance of possession of said goods and control of said business, by sale of said goods by said owner*, shall be deemed fraudulent and void." (Emphasis added.)

It is immediately apparent upon reading the statute that it is not different except in form from the usual Bulk Sales Statute. For example, the California statute makes void transfers of personal property, unless the transfer is accompanied by an immediate delivery and followed by an actual and continued change of possession of the things transferred (California Civil

Code, section 3440). The District Court, in its finding of fact No. II, found as follows:

“Said goods, wares and merchandise were deposited in the field warehouse of Lawrence Warehouse Company theretofore leased by it from Central Auto Supply Company, and remained in the possession and control of the said Lawrence Warehouse Company thereafter.” (Tr. p. 19.)

In other words, the District Court found that the parties did not contemplate a continuance of possession of said goods and control of said business by said owner, but, on the contrary, that the goods and merchandise were deposited in the warehouse of the Lawrence Warehouse Company and remained in the possession and control of the Lawrence Warehouse Company thereafter. The simple question, therefore, to be determined upon this appeal is whether there was evidence to support the finding of the District Court, for, if under the Arizona statute there was an actual transfer of possession and control, the statute is without application to the transaction. This question can be very simply answered. At page 13 of Appellant's Brief, Appellant quotes from the testimony of the witness Robert E. Kersting, wherein the witness said, with reference to the arrangements between the bankrupt and the Warehouse Company: “* * * if we allow them to keep complete control of the inventory as to what came in and what went out, the Valley Bank would then lend us a certain sum of money” (Tr. p. 92).

The premises upon which the goods were stored had been leased to the Warehouse Company, and the Warehouse Company had entered into an agreement with the Central Auto Supply Company which provided the terms under which the Warehouse Company agreed to store the deposited goods (Pl's. Exh. No. 1; Tr. pp. 40-89); the Warehouse Company had placed a large number of signs around the leased premises indicating the fact of the lease and the fact that all of the commodities within the leased premises were within the custody of the Warehouse Company; the leased premises were separated from the premises used by the depositor by substantial partitions (Tr. pp. 93, 104, 154, 161, 180, 187; Defendant's Exh. A; Tr. pp. 103, 150); the leased premises and the goods therein were always under the actual immediate physical possession and control of the bonded employees of the Warehouse Company and no access thereto by others was permitted at any time except in the presence of and with the consent of a Lawrence bonded employee (Tr. pp. 162, 166, 170, 182, 184, 212, 227). No single instance is cited in the record of any person entering or departing from the leased premises except in the presence of and with the consent of a Lawrence bonded employee, and no single instance is cited in which any goods were either deposited in the warehouse or delivered from the warehouse except by a Lawrence bonded employee.

The quoted Arizona statute makes a transfer or lien void (as do almost all Bulk Sales statutes) when the goods so transferred remain on the premises and under the control of the transferor. All of the evi-

dence in this case makes it clear that the goods once deposited in the warehouse left the possession of the Central Auto Supply Company immediately and remained thereafter at all times in the possession of the Warehouse Company. To use the language of the California statute: "The transfer was accompanied by an immediate change of possession and was followed by a continued change of possession."

In the face of the evidence, it is idle for Appellant to remark that the District Court nullified the Arizona statute. The District Court upon the evidence found that the Arizona statute had been complied with exactly.

If we may restate the principal question to be determined, it appears to us to be: "Was there evidence to support the District Court's finding that the goods, wares and merchandise were deposited in the warehouse of the Lawrence Warehouse Company and thereafter remained in the possession and under the control of the Lawrence Warehouse Company?"

SUMMARY OF ARGUMENT.

A single issue, and a single issue only, is presented upon this appeal; that is, whether there was evidence to support the finding of the District Court that the goods in question were deposited in the warehouse of and thereafter remained in the possession and control of Appellee Lawrence Warehouse Company. Appellant in his brief seeks at considerable length to inject an additional issue into the appeal; that is,

whether the Uniform Warehouse Receipts Act (secs. 52-801 to 52-849, incl. of the Arizona Code of 1939) repeals section 62-522 of the Arizona Code of 1939. This question is not before this Court and requires no determination upon this appeal. Under the facts of this case as shown by the evidence and in the findings of the District Court below, there was full compliance with the provisions of both statutes and no question arises as to any conflict between them. The issue is wholly false and requires no extended discussion by Appellees.

ARGUMENT.

I.

THERE WAS NO VIOLATION OF SECTION 62-522 OF THE ARIZONA CODE OF 1939.

Appellant has based his entire action upon an alleged violation of section 62-522 of the Arizona Code of 1939. He so charged in his complaint (Par. III thereof; Tr. pp. 3-4) and in his Objections to Findings of Fact, etc. (Par. IX 3 and X 2 thereof; Tr. pp. 24, 26). Appellee Lawrence Warehouse Company denied any such violation in its answer (Par. III thereof; Tr. p. 7) and Appellee Valley National Bank of Phoenix entered a similar denial in its answer (Par. III thereof; Tr. pp. 11-12). Upon the issue so raised the District Court found against Appellant and that finding is amply supported by the evidence.

Appellant in his Specification of Errors (Nos. 4 and 5; Opening Brief, pp. 20-21) charges that there

is no evidence to support this finding, but nowhere in his brief does he even attempt to show such a lack of evidence. It seems clear to us that this appeal must fail, since Appellant has not even attempted to demonstrate to this Court wherein there was any violation of the statute upon which he relies. Appellant apparently assumes that there was such a violation (although the District Court found upon ample evidence that there was no such violation), and upon that erroneous assumption Appellant seeks to create false issues upon which to blunt his lance.

Section 62-522 of the Arizona Code of 1939 provides as follows:

“A mortgage, deed of trust or any other form of lien attempted to be given by the owner of a stock of goods, wares or merchandise daily exposed to sale, in parcels, in the regular course of the business of such merchandise, *and contemplating a continuance of possession of said goods and control of said business*, by sale of said goods by said owner, shall be deemed fraudulent and void.” (Emphasis added.)

The evidence in the District Court below was uncontradicted that there was, in fact, a complete transfer of possession to Appellee Lawrence Warehouse Company, and there was no “continuance of possession of said goods and control of said business” by the bankrupt after that transfer. No summation of that evidence is necessary here; Appellant has pointed to no single word of evidence to the contrary, and it is clear from the record that the finding of the District Court is fully supported by the evidence.

There having been in fact a complete transfer of possession to Appellee Lawrence Warehouse Company, there was no violation of the Arizona statute and only an excess of caution dictates any further answer to Appellant's Opening Brief.

II.

NO CONFLICT ARISES IN THIS CASE BETWEEN SECTION 62-522 OF THE ARIZONA CODE OF 1939 AND THE PROVISIONS OF THE UNIFORM WAREHOUSE RECEIPTS ACT.

No violation having been shown of section 62-522 of the Arizona Code of 1939, it is self-evident that there is no question here of any conflict between that section and the provisions of the Uniform Warehouse Receipts Act (Sees. 52-801 to 52-849, incl. of the Arizona Code of 1939). It has never been suggested, even by Appellant, that there was any violation here of the Uniform Warehouse Receipts Act itself. On the contrary, it is perfectly clear that the parties here intended to, and did in fact, comply fully with the provisions of that Act.

The question is no longer open for determination that field warehousing under circumstances as shown here is perfectly valid and creates a lien good against the trustee of a bankrupt depositor.

Union Trust Co. v. Wilson, 198 U.S. 530, 49 L. Ed. 1154 (1905) ;

Heffron v. Bank of America N.T. & S.A., 113 Fed. (2d) 239 (9th C.C.A. 1940).

No charge is made here of any violation of the Uniform Warehouse Receipts Act under which the parties to the transaction were acting, and no discussion is necessary to show that the Act was fully complied with in all respects.

It is to be noted that a failure to transfer possession to the warehouseman and to retain possession thereafter would constitute a violation of the Uniform Warehouse Receipts Act just as it would constitute a violation of section 62-522 of the Arizona Code of 1939. The evidence being uncontradicted that there was such a change of possession which continued thereafter, it is clear that there was no violation of either statute, and, consequently, no question can possibly arise as to any conflict between them here.

III.

THE UNIFORM WAREHOUSE RECEIPTS ACT SHOULD BE CON- STRUED TO ACHIEVE UNIFORMITY THROUGHOUT THE COMMERCIAL WORLD.

Appellant dedicates the major portion of his Opening Brief to a wholly unjustified attack upon the principles of field warehousing and to an extended discussion of whether the Uniform Warehouse Receipts Act, as adopted by Arizona, repeals Section 62-522 of the Arizona Code of 1939. As we have stated above, the law is now too well settled to permit any valid attack upon field warehousing conducted in compliance with the Uniform Warehouse Receipts Act. Furthermore, since no violation of Section 62-522 of the Ari-

zona Code of 1939 appears in this case, there can be no conflict here between that section and the provisions of the Uniform Warehouse Receipts Act, and hence the question of repeal of the one by the other is not an issue in this case. There was no charge in the complaint, no reference in the answers, no testimony or other evidence, and no finding with reference to repeal of Section 62-522. Appellant has apparently injected this false issue into the case in an effort to becloud the true issue, i.e., whether there is evidence to support the finding of the District Court that there was a transfer of possession.

While the question is entirely academic upon this appeal, we do not desire to appear to acquiesce in Appellant's view of the law. The Supreme Court of Arizona has recognized the impact of the Uniform Warehouse Receipts Act upon preexisting local law, as follows:

"Local laws must be interpreted in the light of the desire to make the Uniform Warehouse Receipts Act universal in its application throughout the commercial world." *S.R.V.W.U.A. v. Peoria Ginning Co.*, 27 Ariz. 145, 231 Pac. 415.

This principle has been stated and restated by this Court and by the Supreme Court of the United States.

Heffron v. Bank of America N.T. & S.A., 113 Fed. (2d) 239 (9th C.C.A., 1940);

Sampsell v. Lawrence Warehouse Co., 167 Fed. (2d) 885 (9 Cir. 1948);

Union Trust Co. v. Wilson, 198 U.S. 530, 49 L. Ed. 1154 (1905);

Commercial Natl. Bank v. Canal-Louisiana B. & T. Co., 239 U.S. 520, 60 L. Ed. 417 (1916).

These authorities would be controlling on the question if it were an issue in the case, which it is not. In an effort to create the issue, Appellant has assumed two things, first, that the transactions were proper under the Uniform Warehouse Receipts Act, and second, that they were improper under Section 62-522 of the Arizona Code of 1939. The first assumption is correct; no violation of the Uniform Act was ever charged or shown. The second assumption is wholly incorrect; the District Court found upon ample evidence that there was no violation of the section in question, and Appellant has demonstrated no error in that finding. Without that assumption there is no issue of repeal before this Court.

CONCLUSION.

Appellees respectfully submit that there was no error in the judgment of the District Court and that the judgment must be affirmed. Appellant's strictures upon the judgment as permitting a stock of merchandise "to be taken by a secret lien-holder in contravention of the Arizona statute" (Opening Brief, p. 34) and as permitting Appellees "to 'get around' the Arizona law through the use of a very clever scheme which they term 'field warehousing' " (Opening Brief, p. 46) simply have no support in law or in the evidence. The District Court properly found upon adequate evidence that there was no violation of Ari-

zona law as charged by Appellant, and that Appellant was not entitled to recover in this action. The judgment must be affirmed.

Dated, San Francisco, California,
June 21, 1950.

Respectfully submitted,

W. R. WALLACE, JR.,

W. R. RAY,

JOHN R. PASCOE,

WALLACE, GARRISON, NORTON & RAY,

FENNEMORE, CRAIG, ALLEN & BLEDSOE,

Attorneys for Appellee,

Lawrence Warehouse Company.

GUST, ROSENFELD, DIVELBESS, ROBINETT
& LINTON,

Attorneys for Appellee,

The Valley National Bank of Phoenix.

No. 12516

United States
Court of Appeals
for the Ninth Circuit.

FOON GOON MOK,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

MAY 4 - 1950

PAUL P. OGDEN

No. 12516

United States
Court of Appeals
for the Ninth Circuit.

FOON GOON MOK,

Appellant.

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Appellee.

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Appeal from the United States District Court,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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625 Market Street Building,
San Francisco, California.

Attorney for Petitioner and Appellant.

FRANK J. HENNESSY,

United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California.

Attorney for Respondent and
Appellee.

United States of America

PETITION FOR NATURALIZATION

(Filed under Section 324-A of the
Nationality Act of 1940)

To the Honorable the District Court of the United States at San Francisco, Calif. This petition for naturalization, hereby made and filed, respectively shows:

(1) My full, true, and correct name is Fong Goon Mok aka Henry Mok Aks Yick Jue Mok.

(2) My present place of residence is Crown Hotel, 538 Pine St., Rm. 95, San Francisco, Calif.

(3) My occupation is Restaurant Worker. (4) I am 36 years old. (5) I was born on July 18, 1912 in Sun Wei District, Kwongtung Prov., China. (6) My personal description is as follows: Sex, male; color, yellow; complexion, sallow; color of eyes, brown; color of hair, black; height, 5 feet 6 inches; weight, 145 pounds; visible distinctive marks, birthmark on rt. temple and scar on left center of cheek; race, Chinese; present nationality, Chinese.

(7) I am married; the name of my wife is Lum Fung How, we were married on October, 1928, at Sun Wei District, Kwongtung Prov., China. She was born at Sun Wei District, Kwongtung Prov., China, on unkown date and now resides in China.

(8) I have two children; and the name, sex,

date and place of birth, and present place of residence of each of said children who is living, are as follows: Mok Yee Lok-m-bn. January, 1929, in China, Res. Canton City, China; Mok Kwong Yee-m-bn. January 15, 1948, in China, res. in China.

(9) My last place of foreign residence was Sun Wei City, China.

(10) I emigrated to the United States from Hong Kong, China.

(11) My lawful entry in the United States was at New York, N. Y., under the name of Fong Goon Mok on May, 1930, on the unkown vessel or means of conveyance.

(12) I entered the U. S. Army on October 21, 1942, under Serial No. 36-382-761 and was honorably discharged on September 26, 1945.

(13) My place of residence at the time of enlistment or induction into the military or naval forces of the United States was Chicago, Illinois.

(14) It is my intention in good faith to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, State, or sovereignty of whom or which at this time I am a subject or citizen, and it is my intention to reside permanently in the United States. (15) I am not, and have not been for the period of at least 10 years immediately preceding the date of this petition,

an anarchist; nor a believer in the unlawful damage, injury, or destruction of property, or sabotage; nor a disbeliever in or opposed to organized government; nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government. (16) I am, and have been during all of the periods required by law, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. (17) I have not heretofore made petition for naturalization.

(18) Attached hereto and made a part of this, my petition for naturalization, are a certificate of arrival from the Immigration and Naturalization Service of my said lawful entry into the United States (if such certificate of arrival be required by the naturalization law), and the affidavits of at least two verifying witnesses required by law.

(19) Wherefore, I, your petitioner for naturalization, pray that I may be admitted a citizen of the United States of America, and that my name be changed to Henry Mok.

(20) I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, that the same are true to the best of my own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters I believe

them to be true, and that this petition is signed by me with my full, true name: So Help Me God.

/s/ HENRY MOK.

/s/ FONG GOON MOK.

I Certify that the petitioner and witnesses named herein appeared before and were examined by me on February 28, 1949, prior to the filing of this petition.

/s/ ZELMA C. BENTON,

U. S. Naturalization
Examiner.

Affidavit of Witnesses

The following witnesses, each being severally, duly, and respectively sworn, depose and say:

My name is Jung Cheong Ng, my occupation is Student. I reside at 538 Pine St., San Francisco, Calif., and

My name is Di H. Fong, my occupation is Merchant. I reside at 601 Grant Ave., San Francisco, Calif.

I am a citizen of the United States; I have personally known and have been acquainted in the United States with Fong Goon Mok, the petitioner named in the petition for naturalization of which this affidavit is a part, since October, 1948, and I have personal knowledge that the petitioner is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness

of the United States, and in my opinion the petitioner is in every way qualified to be admitted a citizen of the United States.

I do swear (affirm) that the statements of fact I have made in this affidavit of this petition for naturalization subscribed by me are true to the best of my knowledge and belief: So Help Me God.

/s/ JUNG CHEONG NG.

/s/ DI H. FONG.

Subscribed and sworn to before me by the above-named petitioner and witnesses in the respective forms of oath shown in said petition and affidavit in the office of the Clerk of said Court at San Francisco, Calif., this 28th day of February, Anno Domini 1949.

/s/ F. P. BOLAND,

Designated Examiner.

I hereby certify that the foregoing petition for naturalization was by the petitioner above-named filed in the office of the Clerk of said Court at San Francisco, California, this 28th day of February A.D. 1949.

C. W. CALBREATH,

Clerk.

[Seal] By /s/ JANE C. BARROW,

Deputy Clerk.

1300-K-23969.

nds

Oath of Allegiance

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So Help Me God. In acknowledgment whereof I have hereunto affixed my signature.

/s/ HENRY MOK.

/s/ FONG GOON MOK.

Sworn to in open court, this....day of.....,
A. D. 19.....

C. W. CALBREATH,
Clerk.

Petition denied: List No. 2282, 12-13-49. Failure to establish good moral character for required time.

Petition continued from List 2281, 12-12-49 to 12-13-49.

Reason, Hrg.

12-13-49 U. S. Exhibit 1 filed—Court ord. U. S. may withdraw Exhibit 1.

12-13-49 Petnr's Exhibit "A" filed. Notice of appeal Filed 1-11-50.

Notice served on U. S. Atty. and Dist. Director of Imm. & Nat'zn. 1-13-50.

U. S. District Court

Petition No. 90811

In the Matter of the Petition of
Fong Goon Mok aka Henry Mok to Be Admitted
a Citizen of the United States of America.

Affidavits of Witnesses

The following witnesses, each being severally, duly, and respectively sworn, depose and say:

My name is Charles Fong (aka Fong Yew Ming); my occupation is Bus Boy; I reside at 601 Grant Ave., San Francisco, California.

I am a citizen of the United States of America; I have personally known and have been acquainted in the United States with Fong Goon Mok (Henry Mok), the petitioner above mentioned since September, 1948; to my personal knowledge the petitioner has resided in the United States at San Francisco, in the State of California, continuously from September, 1948, to Mar. 1, 1949, and I have personal knowledge that the petitioner is and during all such period has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same, and in my opinion the petitioner is in every way qualified to be admitted a citizen of the United States.

I do swear (affirm) that the statements of fact I have made in this affidavit subscribed by me are

true to the best of my knowledge and belief: So Help Me God.

/s/ CHARLES FONG.

Subscribed and sworn to before me by the above-named witness(es) in the form of oath shown above at San Francisco, California, this 1st day of March, Anno Domini 1949.

[Seal]: /s/ T. L. BALDWIN,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Mar. 1, 1949.

Date, December 13th, 1949. List No. 2282.

This list consists of Five sheets. Sheet No. 4.

NATURALIZATION PETITIONS RECOMMENDED TO BE DENIED

To the Honorable the District Court of the United States sitting at San Francisco, California. J. F. O'Shea and F. P. Boland duly designated under the Nationality Act of 1940 (54 Stat. 1156) to conduct preliminary hearings upon petitions for naturalization to the above-named Court and to make findings and recommendations thereon, has personally examined under oath at a preliminary hearing the following Thirty-Three (33) petitioners for naturalization and their required witnesses, has found for the reasons stated below, that such

petitions should not be granted, and therefore recommends that such petitions be denied.

* * *

(30) Petition No. 90811.

Name of Petitioner, Foon Goon Mok.

Reason for Denial, Failure to establish good moral character for the period required by law.

* * *

Respectfully submitted,

/s/ F. P. BOLAND,

Officer in attendance at final hearing.

Respectfully submitted,

Date, December 13th, 1949.

[Endorsed]: Filed Dec. 13, 1949.

In the District Court of the United States

Date, December 13th, 1949. List No. 2282.

This list consists of Five sheets. Sheet No. Five.

ORDER OF COURT

United States of America,

Northern District of California;

Southern Division—ss.

Upon consideration of the petitions for naturalization listed on List No. 2282 sheet(s) 3 and 4 dated December 13th, 1949, presented in open Court this

Thirteenth day of December A.D., 1949, It Is Hereby Ordered that each of the said petitions be, and hereby is, denied, except those petitions listed below.

Recommendation of Designated Officer Is Disapproved as to the Petitions Listed Below, and each of said petitioners so listed having appeared in person, It Is Hereby Ordered that each of them be, and hereby is, admitted to become a citizen of the United States of America. Prayers for change of name listed below granted,

Petition No.	Name of Petitioner	Change of Name
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* * *

It is further ordered that petitions listed below be continued for the reasons stated.

Petition No.	Name of Petitioner.	Cause for Continuance
--------------	---------------------	-----------------------

* * *

By the Court.

/s/ LOUIS E. GOODMAN,
Judge.

[Endorsed]: Filed Dec. 13, 1949.

RECOMMENDATION PAGE 29, RE: NO. 90811
—PETITION OF FOON GOON MOK FOR
NATURALIZATION, ATTACHED TO AND
MADE A PART OF FINDINGS AND REC-
OMMENDATIONS OF DESIGNATED
EXAMINER, IMMIGRATION AND NAT-
URALIZATION SERVICE. FINAL HEAR-
ING: DECEMBER 13, 1949.

90811

Foon Goon Mok also known as Henry Mok and
Yieh Jue Mok.

The question presented is whether the petitioner has established good moral character, as contemplated by Section 324-A of the Nationality Act of 1940, as amended.

The evidence of record establishes that the petitioner falsely claimed United States citizenship at the time he entered the United States Army in 1942; in applying for a United States passport at Chicago, Illinois, on July 12, 1946; in seeking reentry into the United States in August, 1948; in appearing as a witness in a naturalization proceeding in 1946 and later as a witness for the same person in applying for a United States passport. He also gave false information concerning his marital status, at the time he entered the Army, before a United States Consul in 1947 or 1948, and in seeking reentry into the United States in August, 1948. The false statements in applying for a United States passport on July 12, 1946, and in seeking reentry into the United States in August,

1948, were under oath. All of these false representations were made knowingly and wilfully. The petitioner's continued wilful false testimony concerning his citizenship up to within a few months of the filing of his petition for naturalization precludes him from establishing good moral character.

It is the recommendation of this Service that the petition of Foon Goon Mok, also known as Henry Mok and Yich Jue Mok, be denied on the ground that the petitioner has failed to establish good moral character.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 13th day of December, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

ORDER DENYING PETITION
FOR NATURALIZATION

The petition of Foon Goon Mok for naturalization came on regularly this day to be heard. The

petitioner was present with his attorney, Mr. Zwerin. Francis P. Boland, Esq., Naturalization Examiner, was present on behalf of the United States and presented the adverse recommendation of the Designated Officer of the Bureau of Immigration and Naturalization. The petitioner was duly sworn and examined. Mr. Boland introduced in evidence and filed U. S. Exhibit No. 1 (copy of passport application). Ordered that the United States may withdraw U. S. Exhibit No. 1. Mr. Zwerin introduced in evidence and filed Petitioner's Exhibit "A" (photostat of Honorable Discharge and Army Record). After hearing the petitioner and counsel, thereupon, on motion of Mr. Boland, and due consideration having been thereon had,

Ordered that said petition for naturalization be, and the same is hereby, Denied upon the ground that the petitioner has failed to establish his good moral character for the required period of time. The foregoing is in accordance with a signed order this day filed.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the petitioner, Foon Goon Mok, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment heretofore and on the 13th day of December, 1949, rendered and filed against said

Foon Goon Mok denying his petition for naturalization.

Dated: This 11th day of January, 1950.

/s/ K. C. ZWERIN,

Attorney for Petitioner.

[Endorsed]: Filed January 11, 1950.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The petitioner does hereby designate the following records which he desires certified to the United States Court of Appeal for the Ninth District:

1. Original or certified copy of Petition for Naturalization.

2. Original or certified copy of naturalization petitions recommended to be denied.

3. Report and recommendation of designated examiner.

4. Reporter's transcript of proceedings.

5. Honorable Discharge from United States Army dated September 26, 1945, of petitioner.

6. Original or certified copy of findings of Board of Special Inquiry dated August 27, 1948, before Immigration and Naturalization Service.

7. Original or certified copy of order of Immigration and Naturalization Service dated October 20, 1948, staying execution of excluding order.

8. Order denying petition for naturalization.

9. Notice of Appeal.

10. Original or certified copy of Order of Immigration and Naturalization Service dated October 13, 1948, excluding appellant.

Respectfully submitted,

/s/ KENNETH C. ZWERIN,

Attorney for Petitioner.

[Endorsed]: Filed February 7, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including April 1, 1950, to file the Record on Appeal in the United States Court of Appeals in and for the Ninth Circuit.

Dated: February 17, 1950.

/s/ LOUIS GOODMAN,

United States District Judge.

[Endorsed]: Filed February 17, 1950.

United States Department of Justice
Immigration and Naturalization Service
No. 90811

Oct. 20, 1948

RECOMMENDATION THAT EXECUTION OF
THE EXCLUDING ORDER BE STAYED

In the Matter of the Petition of Foon Goon Mok
for Naturalization.

File: A-6953565-San Francisco (1300-80612)
(No Appeal.)

In re: Mok Fong Goon or Mok Yick Jue or Henry
Mok in Exclusion Proceedings.

In Behalf of Appellant:

CHOW and SING,

Attorneys,

550 Montgomery Street,

San Francisco 11, California,

and

LAMBERT O'DONNELL,

Attorney,

957 Warner Building,

Washington 4, D. C.

Excluded: Act of 1924—No immigration visa
Executive Order 8766—No passport.

Application: That execution of the excluding
order be stayed.

Detention Status: Released under \$3,000 bond.

Discussion: This record relates to a 38-year-old
male, native and citizen of China, who was ex-
cluded from admission to the United States by a

Board of Special Inquiry at San Francisco, California, on August 27, 1948. On October 13, 1948, the Assistant Commissioner considered this case on appeal, ordered that the excluding decision of the Board of Special Inquiry be affirmed; and further ordered that the application for stay of execution of the excluding order be denied.

The subject alien is a veteran of World War II having been honorably discharged from the Army of the United States on September 26, 1945, after service therein from October 7, 1942. In our order of October 13, 1948, we denied counsel's request that execution of the excluding order be deferred to permit the alien to apply for naturalization under Public Law 567. However, counsel now states that the alien filed a petition for naturalization at the San Francisco, California Office of this Service on October 5, 1948. In the circumstances, execution of the outstanding excluding order will be deferred pending the outcome of the alien's petition for naturalization provided said petition was filed as claimed.

Recommendation: It is recommended that execution of the outstanding excluding order be stayed pending final determination of the alien's petition for naturalization provided said petition was filed on October 5, 1948, as claimed.

Chief Examiner.

So Ordered:

Assistant Commissioner.

EJD:aeb

[Endorsed]: Filed March 31, 1950.

In the Southern Division of the United States
District Court for the Northern District of
California

In the Matter of the Contested Petition for Nat-
uralization of Foon Goon Mok

Before: Hon. Louis E. Goodman,
Judge.

PROCEEDINGS ON HEARING ON CON-
TESTED PETITION FOR NATURALIZA-
TION

Tuesday, December 13, 1949

Appearances:

For the Petitioner:

KENNETH CARLTON ZWERIN, ESQ.

For the United States:

FRANCIS P. BOLAND, ESQ.

Mr. Boland: Your Honor, there is one more
attorney whose case we have to dispose of, and that
is No. 29, for Foon Goon Mok.

The Clerk: What number?

Mr. Boland: 29. No. 9081.

FOON GOON MOK

called in his own behalf; sworn.

The Clerk: Will you state your name to the
Court?

A. Mok Foon Goon.

(Testimony of Foon Goon Mok.)

Direct Examination

By Mr. Boland:

Q. Do you think you understand enough English to understand what is going on today?

A. I try, sir.

Q. What? A. I try.

Q. Well, do you think you should have an interpreter here so you will understand completely what is going on? A. Yes.

Q. What?

The Court: How long was he in the army?

Mr. Zwerin: Three years, Your Honor, overseas most of that entire time.

The Court: Well, with a captain in the army, and he must have been able to talk well enough.

Mr. Boland: Well, when I was taking a statement from him now, he didn't appear to understand me. Whether it was deliberate or not, I don't know. But I felt——

The Court: Most of the Chinese people that were in the army who were unable to comprehend were discharged within a few months. You know, we had a lot of those cases where Judge St. Sure rendered his decisions denying the going behind the certificate of service in the army. Most of them were discharged. I shouldn't think he would be in the army three years if he couldn't understand.

Mr. Zwerin: He was with an officer most of that time, too.

Mr. Boland: The reason I asked the question

(Testimony of Foon Goon Mok.)

was that when I took a statement from him, he did not understand me; so I had to use one of our interpreters. I wanted him to be sure to understand what was going on now.

The essential facts here are not in dispute; the petitioner was born in China and came to the United States about 1930, he came illegally at that time. In 1942—I will give you the exact date—October 7, 1942, he entered the armed forces of the United States and at that time claimed birth in the United States. He was honorably discharged from the army on September 26, 1945. His certificate of military service shows that he served outside the continental limits of the United States from March 5, 1943, to September 17, 1945.

Mr. Zwerin: Two years and six months.

Mr. Boland: On July 12, 1946, he applied for a United States passport. Here is a certified copy, which I offer in evidence, of his application for a passport.

The Clerk: U. S. Exhibit No. 1.

(Thereupon certified copy of application for passport was received in evidence and marked United States Exhibit No. 1.)

Mr. Boland: I would like permission to withdraw it at the end of the hearing.

The Court: Very well.

Mr. Boland: During 1946 he also appeared as a witness in a naturalization proceeding, wherein he claimed he was a citizen, and a man was natural-

(Testimony of Foon Goon Mok.)

ized with him as a witness. In that same year he also executed an affidavit wherein he claimed citizenship for that same man.

In August of 1948 he came to San Francisco from China on the passport which he had procured, and at first claimed that he was born in San Francisco. A few days later he admitted that he was not born in San Francisco. Both times those statements were made under oath. He also, before an officer of this service, and to the army, claimed that he was not married, claimed he was not married when he entered the army. He claimed he was married in 1947 when he applied to enter the United States. His first statement, in August of '48, that was. In the second statement he claimed he had been married twice, both times to the same woman. He married a Chinese woman the second time in the American consul's office.

Mr. Zwerin: In China?

Mr. Boland: In China, yes.

That is about the extent of the false representations and about the extent of our case. If there are any further questions which counsel would care to have me bring out?

Mr. Zwerin: No, Mr. Boland, I have a copy here of the summary report, which you undoubtedly have, since it came from your office, which shows that he was detained in Honolulu on his way back from China and then brought here on the 11th of August, at which time the primary hearing

(Testimony of Foon Goon Mok.)

was discontinued and further investigation instituted. And then on August 16th, five days later, 1948, he was questioned and at that time freely admitted that he was in fact born in China, giving his correct name and true birth date. No indictment was returned in this case, Your Honor, no criminal prosecution was instituted.

I may say, Your Honor, that this is an application, of course, under the military provision of the law. The discharge, a photostatic copy of which I have here, shows that he served in the European-African-Middle Eastern theater and was awarded a ribbon with one silver and two bronze battle stars and five overseas service bars. He was in the army a few days less than three years and was in the continental United States only four months and 25 days of that entire time. The rest of the time he served overseas. He was discharged for the convenience of the government; it is an honorable discharge.

I ask leave to file it as petitioner's exhibit first in order.

(Thereupon discharge from army was received in evidence and marked Petitioner's Exhibit A.)

Mr. Zwerin: Yes. Now, if Your Honor pleases, with regard to the defendant's present situation, the Immigration people ordered that he be excluded. I don't have the date of that exclusion order. 8/27/48 was the original hearing. And an appeal

(Testimony of Foon Goon Mok.)

was then taken to Washington through the Immigration Service, which affirmed the order of exclusion, but then, in view of the fact that this petition for naturalization had been filed and that their order be stayed pending the final determination of the alien's petition for naturalization. So the status of this alien, if Your Honor pleases, is a little different than, perhaps, some of the others before you; and that is, if his application be denied, he will immediately be deported.

As I say, he comes here under the military. Your Honor is undoubtedly familiar with the fact that the law was changed, permitting people that served in the armed forces to make application. The particular provision for seven years was deleted, and there has been a question among lawyers, and I think even in the Immigration Service, as to what has been meant by the action of Congress in deleting the time element. Your Honor, I know, in the past, has denied some of these applications. I [6] understand that in a similar matter pending before Judge Erskine, the application was granted for citizenship, and the government then took an appeal, and that appeal is still pending, and hasn't been determined by the Circuit Court. I believe Judge Erskine's case was similar to this, Mr. Boland. It was a military man?

Mr. Boland: Yes.

Mr. Zwerin: No indictment was returned. It was a false claim to citizenship. The applicant was awaiting deportation.

(Testimony of Foon Goon Mok.)

Mr. Boland: Well, I have forgotten what the false statements were about, but it did involve false statements.

Mr. Zwerin: It is comparable to this case.

Mr. Boland: And he is deportable, or he was before Judge Erskine admitted him.

The Court: Of course, we had a number of these cases of false claims to citizenship that were prosecuted.

Mr. Zwerin: Yes, Your Honor. I handled some of them.

The Court: I think you were representing some of them, acting as attorney in several cases.

Mr. Zwerin: Of course, here is a man who served this country, and apparently served it well, in the army—who, if he had been properly advised, could have made application under the law and would probably have been granted his citizenship. Instead of which, apparently, he was misadvised and now finds himself, after being in this country for some 23 or 24 years, [7] subject to being deported. How long has he been here, Mr. Boland?

Mr. Boland: We have never been able to verify his entry, but I believe that he consistently claimed entry in 1930.

Mr. Zwerin: 1930. This is 1949; almost 1950.

Mr. Boland: Now this is slightly different from the normal case of a person who has been guilty of misconduct before his military service or during the military service. Here the misconduct took place after his discharge; presumably he should

(Testimony of Foon Goon Mok.)

have known that he could be naturalized as an alien. Then he not only makes the false claim of citizenship for his own interests, but he goes out and makes a false claim of citizenship as a witness in a naturalization proceeding, indicating a complete disregard of the possibility of voiding that man's citizenship. Not once, but twice. When this man applies for citizenship in Chicago, he acted as a witness for him there, and then when this same man is applying for a United States passport, he again claims citizenship and executes an affidavit for him. So here, all of his misconduct occurred after his military service, and has been continuing up to August of '48, when he made a complete breast of everything.

Mr. Zwerin: And since he filed his petition, which was on October 5th of 1948, over a year ago, you have nothing to report since that time, Mr. Boland, as to misconduct?

Mr. Boland: Well, I don't know when our latest criminal record is, but I don't know of any.

The Court: August, 1948?

Mr. Boland: I don't think there is any.

Mr. Zwerin: Yes, Your Honor, the application was filed for citizenship in October of 1948 and then the stay order was issued on October 20, 1948, from Washington.

Mr. Boland: I think the petition was filed later than that.

Mr. Zwerin: The petition, yes.

Mr. Boland: The petition for naturalization.

(Testimony of Foon Goon Mok.)

The Court: Well, the trouble is, counsel, that as you know the extent of this racket of claiming American citizenship is so great that it resulted in innumerable prosecutions here, and of course many of the Chinese people are imposed upon by these racketeers who sold them fake birth certificates.

Mr. Zwerin: There is no birth certificate involved in this matter, Your Honor.

The Court: No, but it became a scandalous situation, the whole thing.

Mr. Zwerin: I am familiar with the whole situation.

The Court: Yes.

Mr. Zwerin: And the matter where even non-Chinese were involved.

The Court: But it is pretty hard to——

Mr. Zwerin: Pretty hard to send this man back.

The Court: The only basis upon which I can rest a decision admitting the applicant to citizenship would be sympathy for him.

Mr. Zwerin: It is pretty hard to send him back to China at this time.

The Court: Well, of course, that might be the effect, that he might be deported; but that also might be the effect of denying an application for citizenship in other cases, too. It is a question of whether his entry was lawful—his entry into the United States. And I think it might be considered a harsh rule by the department to deport a man who served honorably in the armed forces.

(Testimony of Foon Goon Mok.)

Mr. Zwerin: There is no criminal record involved with this man. There is none at all.

The Court: There is an offense committed, however.

Mr. Zwerin: I understand, but I mean, what I had in mind, Your Honor, was that during his residence in the United States prior to going into the army, there is no police record as such.

The Court: I think that the decision of the Immigration people is somewhat harsh, if his application for citizenship is not approved, in deporting him, in view of his honorable service in the armed forces. But where an offense such as this has been committed and admittedly so, I don't see upon what basis, except sympathy, that I could make an order admitting him to citizenship. He swore falsely that he was an American citizen on more than one occasion; once in his own interests and also to get somebody else admitted to citizenship.

Mr. Zwerin: And he swore falsely to be an American citizen when he enlisted in the United States Army, Your Honor.

The Court: Enlisted or drafted?

Mr. Zwerin: I believe he was drafted, but at any rate, when he registered for the draft.

The Court: He would have been eligible for the draft anyhow.

Mr. Zwerin: It says "inducted into the military service," but I wouldn't rely on that, because they might conclude that anyone reported by the draft board was inducted.

(Testimony of Foon Goon Mok.)

The Court: Well, Congress has fixed a rather severe penalty for false claims of American citizenship. It is considered a serious offense. It was committed. It may not have been prosecuted for reasons which were sufficient to the prosecuting authorities—probably because of his record in the army. But the naturalization statute provides for a good character, and here within a very brief period before he applied for citizenship, he made this false affidavit, and the one in 1946, only two years before he applied for citizenship, he swore falsely in behalf of some other applicant for citizenship. So I don't see how I can with good conscience——

Mr. Zwerin: Well, could Your Honor take this matter under submission pending the opinion by the Circuit Court? It may clarify the situation, since Judge Erskine's ruling is there being passed upon.

The Court: Well, I don't know what the facts are in the case Judge Erskine ruled upon.

Mr. Zwerin: They are comparable—a comparable situation.

The Court: Well, that is a word—"comparable" that——

Mr. Zwerin: That attorneys use.

The Court: "Comparable" is a word that covers a lot of ground.

Mr. Boland: Well, in that case I recommended against an appeal, because I felt the issue was an issue of fact, and I still think that when it gets upstairs the Court will decide that this case in ap-

(Testimony of Foon Goon Mok.)

peal from Judge Erskine is a question of fact for the trial court. I don't see where any precedent in that case——

The Court: Do you happen to remember what the facts were?

Mr. Boland: There are false statements as to—I don't know whether it was as to his marriage or what it was. But anyway, there were false statements up to approximately a month or two months prior to the filing of the petition.

The Court: Well, was that false claim of citizenship?

Mr. Boland: I don't recall. I have so many of these that I forget them.

Mr. Zwerin: It was military background.

Mr. Boland: Yes, he did have such.

Mr. Zwerin: But the false statements, if Your Honor pleases, were up to approximately two months prior to the filing of the application.

The Court: But did the man in Judge Erskine's case swear falsely that he was an American citizen to get somebody else naturalized, and also in his own behalf?

Mr. Boland: No, it was only to protect himself that he swore falsely, and I think the false statements were in regard to his marital status. He had been guilty of bigamy, too.

The Court: He was what?

Mr. Zwerin: He was a bigamist as well, Your Honor. He was guilty of bigamy, wasn't he, in Judge Erskine's case?

(Testimony of Foon Goon Mok.)

Mr. Boland: Yes.

Mr. Zwerin: This man has had a laudable record in the army, Your Honor. Battle stars and campaigns.

The Court: What did you do in the army?

The Witness: I worked for the officers.

The Court: What kind of work did you do?

A. For the quartermaster.

Q. What kind of work did you do yourself?

A. Now?

Q. No, in the army.

A. I mean, I work for the officers.

Q. Yes, I know, you worked for the officers, but what did you do, what kind of work did you do?

A. Mak-a bed, iron the clothes, you know.

Mr. Zwerin: The record discloses the word "orderly," Your Honor.

The Court: You were an orderly?

A. Yes.

Q. Who were you orderly for?

A. Well, the captain, they call me, you know—wash clothes, mak-a bed.

Q. I see. And where were you, in Germany?

A. Yes, Germany, Africa.

Q. And in Africa? A. Italy.

Q. Your captain was in the Quartermaster Department? A. That's right.

Mr. Zwerin: He was overseas for two years and six months.

The Court: But I don't know how I can disregard this record of——

(Testimony of Foon Goon Mok.)

Mr. Zwerin: He is like so many of these Chinese, Your Honor. They just love this country too much.

The Court: Well, there may be something in that, but there is a lot of other people who would like to get here, too.

Mr. Zwerin: Well, you see, if he hasn't made his application for the passport, or if he hadn't, he probably would have remained in Chicago where he was in the laundry business, and would have been swallowed up in that Chinatown.

Mr. Boland: Well, he did remain in Chicago, and he made a false claim even there.

Mr. Zwerin: Yes, but I mean—oh, you mean he was just helping a countryman out.

The Court: Well, I am sorry, but I feel that it is advisable to deny this application.

Mr. Zwerin: Yes, Your Honor.

The Court: That is all.

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 15 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ ELDON N. RICH.

[Endorsed]: Filed March 30, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibit, listed below, are the originals filed in this court, or a true and correct copy of an order entered on the minutes of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to-wit:

Copy of Petition for Naturalization.

Copy of Naturalization Petitions Recommended To Be Denied.

Copy of Recommendation Page 29, Attached To And Made A Part Of Findings And Recommendations Of Designated Examiner, etc.

Minute Order of December 13, 1949—Order Denying Petition For Naturalization.

Notice of Appeal.

Designation of Record.

Order Extending Time To Docket to April 1, 1950.

Copy of Order of Immigration and Naturalization Service dated October 20, 1948, Staying Execution Of Excluding Order.

Petitioner's Exhibit No. A—Copy of Honorable Discharge.

Reporter's Transcript for December 13, 1949.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 31st day of March, A. D. 1950.

C. W. CALBREATH,
Clerk.

[Seal]: By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12516. United States Court of Appeals for the Ninth Circuit. Foon Goon Mok, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California Southern Division.

Filed March 31, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit
No. 12516

FOON GOON MOK,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY IN THE
APPEAL OF THE ABOVE ENTITLED
MATTER

Comes now Foon Goon Mok, by and through his attorney, Kenneth Carlton Zwerin, and files herein the statement of points on which appellant intends to rely in the appeal of the above entitled matter.

I.

The District Court erred in finding that said appellant had not established good moral character as required by Section 324 (a) of the Nationality Act of 1940 (8 U.S.C.A. 724 (A)).

II.

The District Court erred in denying appellant's petition for naturalization as a citizen of the United States.

/s/ KENNETH C. ZWERIN,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 6, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE INCORPORATED IN TRANSCRIPT OF RECORD
ON APPEAL

Appellant, Foon Goon Mok, by and through his attorney, Kenneth Carlton Zwerin, in the above entitled matter, hereby designates the entire record in the above entitled matter to be included in the transcript of record on appeal on his pending appeal from the judgment heretofore made, filed and entered in said matter denying appellant's petition for citizenship.

/s/ KENNETH C. ZWERIN,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 6, 1950.

No. 12,516

IN THE

United States Court of Appeals
For the Ninth Circuit

FOON GOON MOK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

KENNETH C. ZWERIN,

625 Market Street, San Francisco 5, California,

Attorney for Appellant.

FILED

MAY 31 1950

PAUL P. OCHS, JR.

CLERK

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No. 12,516

IN THE

**United States Court of Appeals
For the Ninth Circuit**

FOON GOON MOK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTION STATEMENT.

Appellant filed a Petition for Naturalization under the provisions of Section 324(a) of the Nationality Act of 1940 (8 U.S.C.A. 724 (A)) in the United States District Court for the Northern District of California, Southern Division, on the 28th day of February, 1949 (T. 2-6). His Petition for Naturalization was denied by District Judge Louis E. Goodman on December 13, 1949, upon the ground that the petitioner had failed to establish his good moral character for the required period of time (T. 13-14). Notice of appeal was filed with the Clerk of the District Court on January 11, 1950 (T. 15).

Jurisdiction of the District Court to entertain the Petition for Naturalization is conferred by Section

301 of the Nationality Act of 1940 (8 U.S.C.A. 701). Jurisdiction of the Court of Appeals to review the District Court's final order is conferred by Section 128 of the Judicial Code, as amended (28 U.S.C.A. 1291).

The order of the District Court in denying the petitioner's application for United States citizenship is a final decision within the meaning of Section 128 of the Judicial Code. (See *Tutun v. U. S.*, 270 U.S. 568, 46 S. Ct. 425, 70 L. Ed. 738.)

STATEMENT OF THE CASE.

The appellant, a 38 year old male, native of China, came to the United States about 1930, and on October 7, 1942, entered the United States Armed Forces and at that time he claimed birth in the United States. He served outside the continental limits of the United States from March 5, 1943, to September 17, 1945, a period of two years and six months, and was honorably discharged from the Army on September 26, 1945, and he was in the Army a few days less than three years. The appellant served in the European-African-Middle Eastern theatres of war and was awarded a ribbon with one silver and two bronze battle stars and five overseas service bars.

He applied for a United States passport in Chicago, Illinois on July 12, 1946, and at that time falsely claimed United States citizenship and in seeking his reentry in the United States in August, 1948, he likewise claimed birth in the United States.

The appellant appeared as a witness in a naturalization proceeding for a friend in 1946 at which proceedings the appellant claimed he was a citizen of the United States, and later as a witness for the same person when this man applied for a United States passport.

The appellant gave false information concerning his marital status at the time he entered the Army, before a United States consul and in seeking reentry in the United States. Appellant denied he had been married although, at that time, the applicant had been married and subsequently re-married the same Chinese woman. The first marriage was according to Chinese custom prior to his original entry and the second time in the American consul's office after he returned to China and after he received the passport in 1946. Petitioner was detained in Honolulu on his return from China and on August 15, 1948, and frankly admitted before the Immigration Service that he was born in China and his marriage.

No criminal indictment was founded, and appellant has never been arrested nor charged with crime.

The Immigration and Naturalization Service has ordered that appellant be excluded from admission to the United States and has stayed the execution of the outstanding excluding order pending final determination of appellant's petition for naturalization (T. 17).

On February 29, 1949, appellant filed his Petition for Naturalization under Section 324 (a) of the Nationality Act of 1940, and two verifying witnesses ap-

peared before a representative of the Immigration and Naturalization Service, said verifying witnesses being citizens of the United States, and said verifying witnesses stated that they had personal knowledge that petitioner is a person of good moral character. On March 1, 1949, a further affidavit was executed attesting to the fact that the affiant had known the appellant since September, 1948, and that appellant is and during the period between September, 1948, and the date of the affidavit, to-wit, March 1, 1949, was a person of good moral character.

On December 13, 1949, appellant's Petition for Naturalization, upon recommendation of the Immigration and Naturalization Service, was denied by the Honorable Louis E. Goodman, United States District Judge, for the reason that the appellant "has failed to establish his good moral character for the required period of time" (T. 14).

SPECIFICATION OF ERRORS.

1. That the District Court erred in finding that said appellant had not established good moral character as required by Section 324(a) of the Nationality Act of 1940 (8 U.S.C.A. 724(A)).

2. That the District Court erred in denying appellant's Petition for Naturalization as a citizen of the United States.

SUMMARY OF APPELLANT'S ARGUMENT.

The problem here is to determine whether the appellant failed to establish good moral character before the District Court and, assuming that he failed, for what period prior to the filing of his application for naturalization was the Court justified in considering in determining whether the appellant possessed good moral character as required under the specific section of the Nationality Act under which appellant filed his petition.

ARGUMENT.

DOES THE TESTIMONY SHOW THAT APPELLANT HAS FAILED TO ESTABLISH HIS GOOD MORAL CHARACTER?

The recommendation of the designated examiner and his testimony in Court sets forth the following facts upon which it is claimed that appellant has failed to establish his good moral character:

1. He claimed birth in the United States when he entered the armed forces of the United States on October 7, 1942.

2. He applied for a passport on July 12, 1946, at which time he claimed to be a citizen of the United States.

3. At the time of his reentry into the United States in August, 1948, appellant claimed he was born in the United States.

4. Appellant appeared as a witness in a naturalization proceeding in 1946 and later as a witness for

the same person when that person applied for a United States passport.

5. Appellant gave false information concerning his marital status at the time he entered the Army, before a United States Consul and in seeking reentry into the United States.

It thus appears that the appellee bases its order upon three premises.

Firstly, appellant's various claims to birth in the United States; secondly, appellant's appearance as a witness in a naturalization proceeding; and, thirdly, appellant's false statement concerning his marital status.

It should be noted, with regard to the second category, that the person who was naturalized, with the appellant as a witness, was qualified to be a citizen of the United States.

Likewise, appellant's false statements concerning his marital status does not seem to have resulted in anyone having been hurt. When he entered the Army he could have had an allotment made to his spouse the greater portion of which the government would have paid had he disclosed his marriage. By stating that he was single he did not cost the government this additional amount. Moreover, appellant believes, in connection with this alleged false claim, that this Court should keep in mind the fact that appellant's first marriage was in accordance with Chinese tradition and that a question has arisen before the Immigration and Naturalization Service as to the validity of such marriages. Such marriages occur without any

license or recordation of the fact and without any legal document to substantiate the marriage or any entry upon any public or ecclesiastical record. No clergyman or state officer officiates at such weddings and the ceremony seems to be nothing more than a statement by the participants that they are husband and wife and the drinking of tea together. Because of the attitude of the Immigration and Naturalization Service in questioning these marriages, a custom has now arisen among the Chinese of remarrying their spouses before the American consul in one of the cities in China or Hong Kong so that permanent recordation may be made of the fact. Obviously appellant would have been precluded in participating in this marriage and having it solemnized before the American consul had he disclosed the previous marital status.

Appellant urges that the two latter premises upon which the appellee bases its order, while serious, are not sufficient to show that he does not have good moral character. Such false statements do not seem to have harmed anyone nor do they seem to have been the type of conduct that would outrage the moral feelings of his neighbors.

Appellant did not produce, as others who have had their application for naturalization denied, any false documents purporting to show that he was a native born citizen nor any fraudulent birth certificate nor perjured statements. Also, unlike other applicants, appellant has never been charged with crime either arising out of his false claim to native birth or for any other violation of any law either under the statutes

of the United States or any state. Appellant's alleged bad moral character occurred subsequent to his honorable discharge from the United States Army.

The meaning of the expression in the Nationality Act of "good moral character" has been the subject of some concern. However, in *Petition of R.....*, (56 F. Supp. 969) the Court held:

"By using in the Nationality Act a phrase so popular as 'good moral character' Congress seems to have invited judges to concern themselves not only with the technicalities of the criminal law, but also with the norms of society and the way the average men of good will act."

This Court, in the case of *United States of America v. Samuel Harrison*, decided March 24, 1950 (No. 12,354), sets forth the test in the words of Mr. Justice Bone as follows:

"Whether the moral feelings now prevalent generally in this country would be outraged by the *conduct* in question."

Appellant respectfully urges that the action of appellant in claiming citizenship in the United States and by accepting the burdens of this citizenship which placed him overseas and in the Army for a few days less than three years, in active theatres of the war, and which resulted in his being awarded a ribbon with one silver and two bronze battle stars and five overseas service bars does not outrage the moral feelings now prevalent generally in this country. Appellant finds himself in a position of a man who apparently loved the United States to such an extent that he, like

other citizens, served and served honorably at a time of great need.

The District Judge recognized that the deportation order against one who had served as honorably as appellant had was a harsh one when he observed (T. 27):

“I think it might be considered a harsh rule by the department to deport a man who served so honorably in the Armed Forces.”

and again (T. 28):

“I think that the decision of the Immigration people is somewhat harsh, if his application for citizenship is not approved, in deporting him in view of his honorable service in the armed forces.”

When we consider that the appellant will not only be deported should his appeal be denied, but deported to a country whose present government and ideology is at variance with the principles to which appellant gave almost three years of his life in Germany, Africa and Italy, merely because the appellant claimed to be born in the United States, appeared as a witness and testified that he was born in the United States and gave untrue statements concerning his marital status, the decision is both harsh and cruel.

The factual situation with which we are presented here is analogous in all material respects to those considered in a series of cases recently before the Board of Immigration Appeals involving applications for suspension of deportation under Section 19 c (2) of the 1917 Immigration Act. These cases are all considered in the *Matter of K*....., No. A6045024, de-

cided by the Board on February 1, 1949, and reported in May, 1949, Monthly Review (Vol. VI, No. 11). *The aliens in each of these cases made false claims to American citizenship within the period of time in which they were required to establish their good moral character under the applicable statute. We quote the following from the reported case:*

“Before discretionary relief will be granted by suspension of deportation, the respondent must appear to be a person of good moral character during the past five years and it must appear that such deportation of the respondent will result in serious economic detriment to his citizen wife and child (Sec. 19 (c) of the Immigration Act of 1917). *In this case the effect of the respondent's false claims to citizenship upon a possible finding of good moral character must be considered.*

“While this Board has denied suspension in the case of an alien falsely and knowingly claiming citizenship after institution of deportation proceedings (Matter of W....., 55933/565, September 24, 1943), it has held suspension proper where an alien claimed citizenship in applying for a job and registering for selective service (Matter of B....., 6033312, affirmed by A. G. September 16, 1947). In the instant case, the false statements (uttered prior to the institution of present proceedings) leading to respondent's voting appear to have been prompted by a fear that he would otherwise lose his job. *In the B..... case it was stated that the granting of suspension was merited in the case of an alien whose record is excellent save for false claim of citizenship. In this connection, counsel states in his brief:*

“‘It may not be entirely accurate to state that the appellant’s record is excellent but taken generally, it seems to comprise a record of what most American communities would find to be reasonably normal activities and behavior without any serious transgressions of morality, decency or law. He has not acquired a criminal record of any kind, has supported his family, worked steadily and maintained the respect of his friends, associates, and employers. No more is asked of members of our community to qualify them as morally worthy and of satisfactory reputation.’

“‘Upon a number of occasions this Board has spoken regarding the character which an alien must possess in order to be granted administrative relief. In the Matter of K....., 6092065 (November 3, 1947), we stated: ‘While we do not condone respondent’s illegal actions in misrepresenting himself as a citizen, we nevertheless do not think that he is precluded from establishing his good moral character.’ *The illegal actions involved therein were false claims of citizenship in obtaining employment, in draft registration, and in registering to vote, for which the alien was convicted of violating Section 746 (a), Title 8, U.S.C., granted a suspended sentence and placed on probation. We have also stated in the Matter of P....., 4383150 (November 17, 1947) that ‘The general tendency has been not to construe good moral character to mean moral excellence, nor to hold that it is destroyed by a single lapse. It is relative and measured by considering the particular person’s actions generally and the regard in which he is held by the community as a whole.’ Since the acts involved in the*

instant case are similar and in a series (with each succeeding false claim being uttered merely to conceal previous statements), respondent may be regarded as being guilty in fact of but one such lapse, for which he has made amends." (Emphasis added.)

Everything that has been said by the Board in these deportation cases would apply with like effect here, and the remarks of the Board quoted from its opinion in the *Matter of P.....*, would be just as pertinent if directed to the facts of this case as they were in the one in which they were made.

FOR WHAT PERIOD PRIOR TO THE FILING OF THE CITIZENSHIP PETITION WAS THE COURT JUSTIFIED IN CONSIDERING APPELLANT'S CONDUCT?

The appellant's misconduct terminated on August, 1948, at which time he frankly admitted he was born in China. His Petition for Naturalization was filed on February 28, 1949, under Section 324(a) of the Nationality Act of 1940 as amended. This section is unlike other provisions of the Nationality Act in that there is *no residence requirement and no prescribed period of time during which good moral character must be shown as a prerequisite to naturalization*. The Congressional Report which accompanied the bill states that its purpose is to make it possible for aliens who have served honorably in the Armed Forces to acquire citizenship through naturalization without the necessity of going through certain processes required of non-service people. The problem to be determined

is for what period of time the appellant must establish he has been a person of good moral character.

In *Application of Murra* (178 F. (2d) 670, Circuit Court, Seventh Circuit, rehearing denied January 31, 1950) a petition was filed under Section 307 (a) of the Nationality Act of 1940 (8 U.S.C.A. 707 (a)) which prohibits naturalization unless "immediately preceding the date of filing petition for naturalization the petitioner has for at least five years been and still is a person of good moral character." The government's contention that the naturalization Court may inquire into the entire life history of the petitioner to ascertain his true character and inclination was rejected, and the Court held that the government in its inquiry as to the fitness of an applicant for naturalization, under this five year residential section, is confined to the five year period immediately preceding the filing of petition for naturalization. The Court observed:

"We cannot believe that Congress meant other than what it said, that is, that if a petitioner meets the enumerated requirements for a period of five years immediately prior to the filing of his petition he is entitled to be admitted. We need not decide that a court is never justified in making inquiry concerning a petitioner previous to the five year period, but what we do think and hold is that even so the fact developed by such an inquiry cannot be used as the basis for disqualification."

The section under which appellant filed his petition has deleted both the residential requirement and the prescribed period of time during which good moral

character must be shown and there does not seem to be any authority as to the time that appellant must show good moral character. However, in the Monthly Review of the Immigration and Naturalization Service for November, 1948, at page 58, the following appears:

“An applicant within the excepted class (not required to have continuous residence in the United States for five years) need only establish that he has been a person of good moral character during the abbreviated period of residence applicable to his class.”

In the article entitled “Trends Towards Uniformity in Naturalization Decisions”, by Edward Rudnick, Supervisor of Citizenship Certificate Unit of the Office of Adjudications, Immigration and Naturalization Service, in the July, 1947 issue of the Service's Monthly Review, the following appears:

“The courts are in general agreement with the Service view that where the required period of residence is less than five years the *applicant need prove good moral character only for the required period.*” (Italics added.)

It should be reiterated that applicant was not required to have any period of residence.

Appellant respectfully urges that from a reading of the section under which appellant filed his petition and the *Murra* decision it is logical to conclude that the intention of the Congressional enactment of Section 324(a) was that petitioners under that section are not required to establish that they have been per-

sons of good moral character for any rigidly defined period of time.

In the case of *Jim Yuen Jung v. Bruce G. Barber* (No. 12455, presently pending before the United States Court of Appeals for the Ninth District) the designated examiner in giving his views as to the precise period for which good moral character must be shown stated as follows (Jim Yuen Jung T. 35) :

“The Service feels that on a military case under 324(a)—we have the two separate acts under 324(a) and 324(A), which is the Veterans Act for World War I and II, no particular length of time being required on that. The view is that the petitioner must show good moral character *from the time of the filing of the petition to the date of the hearing*, but that his conduct for a reasonable period prior to the filing may be considered as indicating what his character is as of the filing of the petition.” (Italics added.)

The petition was filed on February 28, 1949, and the hearing was had on December 13, 1949, and in this regard (T. 26) the designated examiner stated that he did not think there was any misconduct since August of 1948, a period of one year and four months or thereabouts.

Since Congress has seen fit to remove the time period, appellant respectfully urges that the District Court erred in considering appellant's various false claims prior to August of 1948 as the proof that appellant had not established his good moral character.

CONCLUSION.

Had appellant been properly advised, he could have made application at the time he was honorably discharged from the United States Army after serving the United States well during the war and undoubtedly his petition for citizenship would then have been granted. Unfortunately appellant was either ill-advised or not advised and so when he followed the accepted Chinese custom of visiting his homeland and seeing his family and remarrying his wife before the American Consul he procured the passport which led to his false statement in Chicago and upon his return to the United States. However, appellant was never indicted for these false statements nor informed against, and having been ordered excluded from the United States and having exhausted his administrative remedies, now makes application for naturalization.

“The fact that deportation proceeding was pending against petitioner did not bar the Federal District Court from considering petition of naturalization of petitioner instituted under 324(a) which permits honorably discharged war veterans to petition for naturalization.” *Petition of Warhol* (84 F. Supp. 543).

As Mr. Justice Bone remarked in the case of *United States of America v. Samuel Harrison* (supra):

“It may well be that in the exercise of a sound discretion in passing upon a petition for naturalization, a court could, with propriety, disregard evidence of some minor offenses not indicative of moral depravity where the record fails to disclose the commission of serious offenses.”

Appellant respectfully urges that his false claim to being born in the United States is not indicative of moral depravity in view of the fact that he sought no benefit from this false claim but only the privilege of fighting the enemy of the United States.

PRAYER.

Wherefore, appellant prays that the decision of the District Court be reversed and that he be admitted to United States citizenship.

Dated, San Francisco, California,
May 29, 1950.

KENNETH C. ZWERIN,
Attorney for Appellant.

(Appendix Follows.)

Appendix.

Appendix

APPLICABLE STATUTES AND REGULATIONS.

Section 324(a) of the Nationality Act of 1940, as amended, so far as relevant to this proceedings (8 U.S.C. 724 (A)) provides:

“(a) Any person not a citizen who has served honorably in an active-duty status in the military or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States or an outlying possession (including the Panama Canal Zone, but excluding the Philippine Islands), or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall determine whether the persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions: Provided, however, That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purposes of this section.

(b) A person filing a petition under subsection (a) of this section shall comply in all respect

with the requirements of this chapter except that—

(1) he may be naturalized regardless of age, and notwithstanding the provisions of section 703 and 726 of this title;

(2) no declaration of intention, no certificate of arrival, *and no period of residence within the United States or any State shall be required;*

(3) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner;

(4) there shall be included in the petition the affidavits of at least two credible witnesses, citizens of the United States, stating that each such witness personally knows the petitioner to be a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States;

(6) if no longer serving in the military or naval forces of the United States, the Service of the petitioner shall be proved by a duly authenticated certification from the executive department under which the petitioner served, which shall state whether the petitioner served honorably in an active duty status during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, and was separated from such service under honorable conditions; (*Italics supplied.*)

No. 12,516

IN THE

United States Court of Appeals
For the Ninth Circuit

FOON GOON MOK,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

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No. 12,516

IN THE

**United States Court of Appeals
For the Ninth Circuit**

FOON GOON MOK,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Appellant filed his petition for naturalization under the provisions of Section 324(A) of the Nationality Act of 1940 (8 U.S.C.A. 724(A)) in the United States District Court for the Northern District of California, Southern Division, on February 28, 1949 (T. 2-6). His petition was denied by District Judge Louis E. Goodman on December 13, 1949, upon the ground that he had failed to establish his good moral character for the required period of time (T. 13-14). Appellant filed his notice of appeal with the Clerk of the District Court on January 11, 1950 (T. 14-15).

Jurisdiction of the District Court to entertain the petition for naturalization is conferred by Section

301 of the Nationality Act of 1940 (8 U.S.C.A. 701). Jurisdiction of the Court of Appeals to review the District Court's final order is conferred by Section 128 of the Judicial Code, as amended (28 U.S.C.A. 1291).

The order of the District Court in denying the petition for naturalization is a final decision within the meaning of Section 128 of the Judicial Code (see *Tutun v. U. S.*, 270 U.S. 568, 46 S. Ct. 425, 70 L. Ed. 738).

STATEMENT OF THE CASE.

The appellant was born in China on July 18, 1912 (T. 2-21). He entered the United States illegally at New York, N. Y., in May of 1930 on a vessel the name of which is not known (T. 3-21). His petition for naturalization was not supported by a certificate showing the date, place, and manner of his entry to the United States because Section 324(A) of the Nationality Act of 1940 excepted him from such requirement. (See Appendix.)

Appellant was inducted into active service in the United States Army on October 21, 1942, and served therein to September 26, 1945, when he received a certificate of honorable discharge (T. 3-21). At the time of his induction he claimed to have been born in the United States (T. 21).

On July 12, 1946, he made a formal application for a United States passport in which he declared under

oath that he had been born in San Francisco, California, on July 18, 1912, and was a citizen of the United States (U.S. Exhibit No. 1; T. 21).

In the same year of 1946 appellant again falsely claimed United States citizenship by appearing as a supporting witness to a petition for naturalization, which petition was granted (T. 21). Also, in the same year of 1946 he made another false affidavit of citizenship in support of the same person's application for a United States passport (T. 12-22).

In August of 1948, by means of the United States passport which he had secured in 1946, he attempted to reenter the United States as an American citizen and again testified that he had been born in the United States. Five days later he admitted that he had been born in China (T. 22-23).

Appellant's petition for naturalization recites that he was then married to one Lun Fung How, the date of marriage being October of 1928 (T. 2). He twice falsely claimed that he was not married, first to the Army authorities and then to the officers of the Immigration and Naturalization Service (T. 22). In August of 1948, at which time he finally admitted the truth as to his place of birth and his citizenship, he also admitted the fact of his marriage, stating that he had married his wife for the second time at the American Consulate in China in 1947 (T. 22). His petition recites that he has two children: Mok Yee Lok, born January, 1929 in China, and Mok Kwong Yee, born January 15, 1948 in China (T. 3).

On October 20, 1948, the Immigration and Naturalization Service ordered that execution of the order excluding the appellant from the United States be deferred pending disposition of his application for naturalization (T. 17).

CONTENTIONS OF APPELLANT.

The appellant contends that the District Court erred in finding that appellant had not established good moral character as required by Section 324(A) of the Nationality Act of 1940; and also erred in denying appellant's petition for naturalization (Appellant's Brief p. 4).

Appellant raises two main questions: First, whether appellant did fail to establish good moral character before the District Court, and, Second, what period of time was the District Court authorized to consider in determining whether the appellant had established good moral character under Section 324(A) (Appellant's Brief p. 5).

The appellant's brief sets out his several acts from October of 1942 to August of 1948, during which period of time he claimed birth in the United States and American citizenship, and falsified concerning his marital status (Appellant's Brief pp. 5-6).

In addition his brief (pp. 6-7) asserts: First, that his false representation of United States citizenship at the time he appeared as a witness to another alien's petition for naturalization in 1946, and when he sup-

ported the same person's application for a United States passport in the same year, did no harm to anyone; Second, that no person was harmed by his false statements regarding his marital status; and Third, that these offenses are not of a type which would "outrage the moral feelings of his neighbors" (Appellant's Brief pp. 6-7).

In addition, the appellant points out that he, unlike some others who also falsely claimed United States citizenship, did not procure fraudulent documents to support his false claim, nor perjured statements; also, that he has never been prosecuted for these or any other offenses (Appellant's Brief pp. 7-8).

With further reference to his false statements concerning the fact of his wife and child in China, appellant asserts that this resulted in a saving to the Government since the truth probably would have caused an allotment to be made to them (Appellant's Brief p. 6).

The reason for remarrying his wife in China in 1947 is ascribed to the asserted difficulty encountered by his people in China in proving Chinese marriages. He mentions a "custom" recently growing up among the Chinese of remarrying their spouses at American Consulates in China in order to create records of such marriages (Appellant's Brief pp. 6-7).

ARGUMENT.

Since the appellant undertakes to show that his various offenses did not justify the denial of his petition for naturalization and, if they did, questions the period of time during which the District Court could properly require a showing of good character, the appellee will touch upon each act, *seriatim*, and then discuss the main issue raised by the appellant.

1. That no person was harmed by the appellant's false claim to native birth and United States citizenship when he acted as a witness upon his friend's petition for naturalization in 1946.

Section 346(a) of the Nationality Act of 1940 (54 Stat. 1163; 8 U.S.C. 746), then in effect, designated a false statement knowingly made under oath in any proceeding relating to naturalization or citizenship as a felony (see Appendix).

It is apparent that the appellant's action on that occasion was felonious. It is equally apparent that his false testimony included all of the elements of perjury.

By his false claim in support of his friend's passport application in the same year, he again brought himself within the purview of Section 346(a) (18) of the 1940 Nationality Act. In *United States v. Tandaric*, C.C.A. Ind. 1945, 152 F. (2d) 3, rehearing denied 66 S. Ct. 703, 327 U.S. 786, 90 L. Ed. 1012, it was held that under subsection (a)(18) of this section, making it a felony for an alien knowingly to represent himself to be a citizen of the United States, no limitation is placed on the circumstances under which and

the persons to whom false representation is made, as long as it is for a fraudulent purpose.

Perjurious statements are *malum in se*. No argument is needed to show their inherent harm to every citizen as they hamper the administration of justice in the judicial process. Appellant seems unaware that he directly harmed his friend by prejudicing his claim to citizenship and rendering his naturalization certificate subject to revocation.

2. What harm the appellant may have done directly to his wife and child, or to others indirectly, by concealing their existence has not been ascertained. Appellant points to the saving to the Government which resulted by his false statements in that regard. It is clear that this concealment resulted in depriving them of that to which they were rightfully entitled. He asserts that the lack of records in China, coupled with the attitude of the Immigration and Naturalization Service, has created a recent custom among the Chinese of remarrying their wives at the American Consulate there or in Hong Kong. No evidence of such a custom is in the record or elsewhere, and appellee submits that such evidence cannot be produced. A general lack of record evidence of such events as marriage in these Chinese cases has always necessitated acceptance of the testimony of the parties themselves as the only available evidence thereof, and such testimony has in the past, and presently still is, required to be accepted in both immigration and naturalization cases to establish both the fact and the validity of such marriages.

Appellant's real motive for concealing his family status is quite clear. He knew that any disclosure of his 1928 marriage in China would certainly lead to exposure of his false claim to birth in San Francisco in 1912, and it is apparent that his remarriage in China in 1947 was to mask his previous marriage there. Indeed, the appellant frankly sets out his deception in this respect, stating:

“Obviously appellant would have been precluded in participating in this marriage and having it solemnized before the American Consul had he disclosed the previous marital status.” (Appellant's Brief p. 7.)

Just as obviously such a disclosure would have led to the exposure of his fraud and the revocation of his American passport, as well as preventing his reentry to the United States; all of which he well knew and carefully guarded against.

3. Appellant thinks his course of conduct over a period of years from 1942 to 1948, during which time he steadfastly continued his practice of falsity and deceit, was not the kind of conduct that would outrage the moral feelings of his neighbors (Appellant's Brief p. 7).

No evidence whatever has been offered to support appellant's assumption as to the moral feelings of his neighbors. It is submitted that our many statutes condemning and penalizing such acts are sufficient proof of the **contrary**.

Finally, appellant sees some difference between his false claims and the acts of those who have secured

false documents to support them. He seems unaware that his American passport constituted documentary evidence of his claimed citizenship. Since the passport was sufficient for his purpose, he had no reason to secure additional evidence of citizenship; that he has not been penalized for his crimes in no way mitigates their character.

The case of *Petition of R.....* (56 F. Supp. 969), cited by the appellant, involved a female petitioner for naturalization who committed the technical crime of fornication by having sexual intercourse with a man with whom she went through a marriage ceremony in good faith, sincerely but mistakenly believing the man was divorced. The quoted phrase from the court's decision, when read with its context, discloses the court's natural disinclination to ascribe bad moral character to an innocent act which was a technical violation of law. Referring, however, to the quoted excerpt, it is submitted that the appellant's continued conduct fails to meet this test, since neither the norms of society nor the actions of average men condone persistent perjury.

In the case of *U. S. v. Samuel Harrison*, No. 12,354, cited by appellant, the petition was filed under a preceding veteran naturalization statute similar to Section 324(A). In that case the petitioner was guilty of family desertion, bigamy and false testimony. Reference to the decision in the case discloses that the test suggested by the appellee there was accepted and applied by this court, which said, however, that:

“This test is not an irrational one and since it does no violence to the spirit of the law we see no reason for rejecting it. We apply it to the facts of this case and hold that the moral feelings now prevalent generally in this country would be outraged by the immoral and criminal conduct of appellee. Should this court express a contrary conclusion it would be a sad reflection on the mores of our times and a deplorable comment on moral standards existing in the United States. We adhere to the view that the moral climate of America does not encourage crime and criminals.”

Appellant contends that he “accepted the burdens of citizenship”. It is true that he claimed and enjoyed its benefits but, except for his military service, the record is silent concerning any burden or duty or responsibility which he ever acknowledged or performed. Certainly, his military service was commendable; it constitutes the sole basis for his petition for naturalization. As to whether an alien’s honorable military record alone entitles him to citizenship, this court in the *Harrison* case, cited above, stated:

“Appellee argues that an honorable discharge from the army is prima facie evidence of good moral character. Assuming the validity of this contention it requires no argument to demonstrate that such a fact cannot be so conclusive in its evidentiary effect as to outweigh, override and destroy the effect of other evidence which clearly establishes a course of conduct characterized by criminal activities of a serious character. The latter showing may completely negative the idea that

the author of the criminal act is a person of good moral character, and we think that such is the effect of the evidence respecting appellee's conduct. Any other conclusion would imply that citizenship should be granted as a matter of course to all aliens who served in our armed forces regardless of the presence or absence of good moral character. This is not the law."

The appellant voices his apprehension that because of his illegal presence in the United States, an order of exclusion will be enforced against him unless such order may be defeated by his naturalization. The appellee realizes that this Court is not unmindful of ultimate results in this or other cases coming before it, but respectfully submits that it should not be persuaded to go beyond the question raised by the appellant of error in the trial court, since any result which may flow from his conduct—whether it be criminal prosecution or deportation—cannot properly be made an issue in this proceeding. It is clear that his present position was brought about solely by his own criminal conduct. His indirect plea that American citizenship should be awarded to prevent deportation is not tenable. In any event, such deportation would serve the wholesome purpose of reuniting him with his own family in his own country. In view of his illegal entry and subsequent conduct, such result does not appear too harsh a penalty.

Appellant cites cases decided by the Board of Immigration Appeals in which aliens petitioning for suspension of deportation have been guilty of falsi-

ifying their citizenship under various circumstances when applying for employment, registering for selective service, and in registering to vote. He quotes one decision of the B.I.A. to the effect that good moral character is not necessarily destroyed by a *single lapse*, and contends, therefore, that since his many false claims were necessitated by the first one, they should all be regarded as only one (Appellant's Brief pp. 10, 11, 12). On this point, the observation of this court in the above-cited *Harrison* case seems to be a complete answer to this contention and expresses the views of the naturalization courts in general on the point:

"It may well be that in the exercise of a sound discretion in passing upon a petition for naturalization, a court could, with propriety, disregard evidence of some minor offense not indicative of moral depravity where the record failed to disclose the commission of serious offenses. But we are not here called upon to consider such a case. The record before us establishes as a matter of law that appellee is not a person of good moral character."

As to the degree of moral character to be established as a prerequisite to naturalization, it is true that the courts have not demanded the highest degree of moral excellence. The broad and reasonable test generally applied is that a good moral character is one that measures up as good among the people of the community in which the applicant lives. *In re Spenser* (C.C. Ore. 1878) Fed. Case No. 13234. *In re Hopp* (D.C. Wise. 1910) 179 F. 561. In the *Spenser* case

the court held that one who committed perjury had so far behaved as a man of bad moral character as to disqualify him for citizenship.

In the case of *In re Bonner* (D.C. Mont. 1922) 279 F. 789, it was held that the inquiry or proof in naturalization proceedings was not as to the good reputation of the applicant, but as to his good behavior as an index of actual moral character, so that specific acts of bad behavior were material and competent.

In *Repouille v. United States* (C.C.A. N.Y. 1947) 165 F. (2d) 152, it was held that an alien seeking citizenship had "good moral character" if his conduct conformed to the generally accepted moral conventions current at the time.

In *Petition of Zele* (C.C.A. N.Y. 1944) 140 F. (2d) 773, the court held that the test of moral fitness of an alien applicant for naturalization was whether the petitioner had behaved as a person of good moral character during the five years immediately preceding his petition.

An alien need not have been convicted of a felony to justify denial of his application for citizenship on the ground that he is not of "good moral character". *In re Paoli* (D.C. Cal. 1943) 49 F. Supp. 128.

Where an act involving moral turpitude is committed within the statutory period of residence required of aliens seeking naturalization, the fact that no judgment of conviction had been based thereon would not militate against a finding that proof of good moral character during the time had not been fur-

nished. *In re Bookschnis* (D.C. Ore. 1945) 61 F. Supp. 751.

Where an alien had represented himself as a citizen to officials at a United States Navy Base depot and had made false statements to a naturalization examiner, his petition for naturalization was denied for failure to establish good character. *In Petition of Ledo* (D.C. R.I. 1946) 67 F. Supp. 567.

MORAL CHARACTER A QUESTION OF FACT.

What conduct on the part of a petitioner for naturalization does or does not constitute good moral character is a question of fact within the sound judgment of the trial court.

U. S. v. Bischof, C.C.A. N.Y. 1931, 48 F. (2d) 538;

U. S. v. Beda, C.C.A. N.Y. 1941, 118 F. (2d) 458;

Petitions of Rudder, et al., 159 F. (2d) 659, 697.

The question is to be determined from the facts of each particular case.

Daddona v. U. S., 170 F. (2d) 964, 966:

“Good moral character for the prescribed period is a question of fact.”

WHAT IS THE "PRESCRIBED PERIOD" DURING WHICH GOOD MORAL CHARACTER SHALL BE ESTABLISHED?

Appellant points out that his misconduct terminated in August of 1948, after which time he no longer claimed birth in San Francisco and United States citizenship. Section 307(a) of the Nationality Act of 1940 (Section 707(a) U.S.C.A.) specifies that no person "except as hereinafter provided in this Act" shall be naturalized unless he has established (1) five years of continuous United States residence preceding his petition, (2) and between its filing and its final hearing, and (3) good moral character and attachment to the principles of the Constitution of the United States "during all the periods referred to". The bulk of naturalization petitions are filed under this general provision. (See Appendix.) This statutory period in general is judicially construed as an interval which the statute has set up as a probationary period, and consideration is ordinarily limited, therefore, to the petitioner's conduct during that time. This view regards the alien's antecedent conduct as having a bearing on his qualifications only as it may affect the validity of his claim to good character during the prescribed period.

Petition of Zele, 127 F. (2d) 578 (C.C.A. 2, 1942);

U. S. v. Clifford, 89 F. (2d) 184 (C.C.A. 2, 1937);

Petition of Sperduti, 81 F. Supp. 833 (D.C. Pa.).

Representative of the view that the naturalization court should not necessarily limit its consideration of the petitioner's conduct to the period of required residence are the following:

In re Bogunovic (Cal. 1941) 114 P. (2d) 581, prior opinion 106 P. (2d) 247.

In the case of *In re Taran* (D.C. Minn. 1943) 52 F. Supp. 535, it was held that the Government may inquire into the applicant's entire life history to ascertain his true character and inclinations.

In *Petition of Gabin* (D.C. Cal. 1945) 60 F. Supp. 750, the court held that it was not restricted in its inquiry concerning the fitness of applicants for naturalization to the 5-year period fixed by Section 307(a), which is merely the minimum requirement petitioners for citizenship must meet.

In the case of *In re Lipsitz Naturalization* (D.C. Md. 1948) 79 F. Supp. 954, it was held that the fact that 5 years and 9 months had elapsed since the applicant's release from prison after convictions of crimes involving moral turpitude, and the alien had apparently been a law-abiding person during that period, did not entitle the applicant to naturalization.

In the case of *In re Balestrieri* (D.C. Cal. 1945) 59 F. Supp. 181, it was held that although Section 307(a) imposes on the applicant the burden of proving five years of good character, it does not limit, in point of time, the power of the court to examine his qualifications for citizenship.

In the case of *In re Laws* (D.C. Cal. 1944) 59 F. Supp. 179, the court held that an alien who was re-

quired to prove only one year's continuous residence in the United States preceding his petition for naturalization because of his marriage to an American citizen, was nevertheless required to prove good behavior for five years prior to such petition.

From these decided cases it will be observed that naturalization courts do not feel necessarily constrained to limit their inquiry concerning a naturalization applicant's moral character to the period of residence to be established, even where such period is specifically set out in the statute.

Directing attention now to the appellant's specific question as to the period during which the trial court in this case was justified in considering the appellant's conduct, it will be seen that although subsection (b) (2) of Section 324(A) provides that no period of residence need be established, nevertheless paragraph (4) thereof requires that the petition shall be supported by the affidavits of two citizens attesting their knowledge of the petitioner's good moral character.

The Immigration and Naturalization Service has adopted the view that since the statute does not specify the period of good character to be established under this Section, a period of time considered as reasonable should be the applicable rule.

There appear to be no reported cases on this exact point, but the same District Court which denied the appellant's petition, in the unreported case of *Hing Tong Wai*, Petition No. 89798, filed under Section 324(A), also denied that petition for failure to establish good moral character where the petition was filed

on October 12, 1948, and the applicant had entered the United States as a deserting seaman in 1919 or 1920, and had falsely claimed United States citizenship when he made a trip to China in 1933, when he entered the United States Army in 1942, and when he testified before an examiner of the Immigration and Naturalization Service on June 15, 1948. In denying his petition for naturalization on December 8, 1948, the District Court ruled that it was not limited to any prescribed period of time in determining whether the petitioner had established good character.

The same court in the unreported case of *Do Quay Lew*, Petition No. 90299, also filed under Section 324(A) on December 14, 1948, wherein the petitioner on June 6, 1947, falsely claimed United States citizenship before an Immigration Board of Special Inquiry, granted the petition, holding that the petitioner's Army service out-weighed in general his false testimony on the issue of his moral character. In that case the point concerning the period of time required to show good character under that section was not decided.

In an unreported case the Superior Court of the State of California, in and for the City and County of San Francisco, on February 20, 1950, denied Petition No. 28613 of *Ming Fong Lee* because of his false testimony before an Immigration Board of Special Inquiry in which he had set up his false claim to United States citizenship and had also caused his wife and child to falsify in order to gain entry to the United States in April of 1948.

The Petition of *Wong Sie Lim*, decided in 1947 (71 F. Supp. 84) was filed in the U. S. District Court in San Francisco under Section 701 of the Nationality Act of 1940 (8 U.S.C.A. 1001) under a preceding statute granting citizenship to active and honorably discharged members of the armed forces of the United States under conditions very similar to those now embodied in Section 324(A). No period of residence was required to be proved under Section 701. Although the issue in the *Lim* case was not on the point of character, the decision indicates the courts' interpretation of the statutes on the question of its proper construction, holding that the law was *not* to be liberally construed in favor of the alien on the ground that it was remedial legislation. In the *Lim* case the court thoroughly reviewed the legislative history relating to the naturalization of members of the armed forces and those honorably discharged and cited several decisions of the United States Supreme Court as authority for the general ruling that:

"It is still an historic precept of our scheme of naturalization that 'statutes prescribing qualifications and governing procedure for admission are to be construed with definite purpose to favor and support the government. And in order to safeguard against admission of those who are unworthy, or *who for any reason fail to measure up to required standards*, the law puts the burden upon every applicant to show by satisfactory evidence that he has the specified qualifications.' "

In another unreported case filed in the same court under Section 701—that of *Alexander Andrew Bari-*

atinsky, No. 826M,—the applicant had falsely claimed citizenship on several occasions from 1933 to 1944 and was convicted in 1946 for falsely claiming citizenship and placed on probation for two years. He had previously been denied naturalization by the U. S. District Court at Baltimore, Md., on April 27, 1945. He was granted citizenship on April 28, 1949, upon the recommendation of the Immigration and Naturalization Service which pointed out that the section of law under which his petition was filed did not specify the period during which the petitioner was required to establish good character, and that a reasonable period would therefore appear to be the proper rule to apply in such cases. In this case the applicant's violations of law occurred prior to his honorable discharge.

In the case of *United States v. Samuel Harrison*, No. 12,354, referred to above, this Court did not feel required to confine itself to any specific period of time in determining whether the applicant's conduct disclosed his good moral character. The petition was filed in December of 1946 and it is evident that the court was viewing the petitioner's record as far back as 1937 when he deserted his family.

CONCLUSION.

Appellee submits that the view of the Immigration and Naturalization Service that a petitioner under Section 324(A) of the Nationality Act of 1940 should be required to show good conduct for a "reasonable period" of time prior to his application for naturali-

zation is, in itself, a reasonable rule of construction applicable to this section, and that the courts in general are properly adopting and applying it; that the appellant's conduct preceding his petition does not meet the test of such rule; and that the District Court in so holding remained well within the area of its proper and legal discretion and therefore did not err, as appellant contends, in denying his petition for his failure to establish good moral character as required by Section 324(A) of the Nationality Act of 1940.

Accordingly, the appellee believes that the order of the District Court of the United States, dated December 13, 1949, denying the petition of the appellant for citizenship was proper and should therefore be affirmed.

Dated, San Francisco, California,
June 23, 1950.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

EDGAR R. BONSALE,

Assistant United States Attorney.

Attorneys for Appellee.

STANLEY B. JOHNSTON,

Adjudications Division, Immigration and Naturalization Service,

On the Brief.

(Appendix Follows.)



Appendix.

Appendix

ACT OF JUNE 1, 1948

(PUBLIC LAW 567, 80TH CONGRESS; CHAPTER 360, 2D SESSION)
TO AMEND THE NATIONALITY ACT OF 1940.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Nationality Act of 1940, as amended (54 Stat. 1137; 8 U.S.C. 907), be amended by adding a new section to be known as section 324A, as follows:

“Sec. 324A. (a) Any person not a citizen who has served honorably in an active-duty status in the military or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States or an outlying possession (including the Panama Canal Zone, but excluding the Philippine Islands), or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall determine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions: *Provided, however,* That no person who is or has been separated from

such service on account of alienage, or who was a conscientious objector who performed no military or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purpose of this section.

“(b) A person filing a petition under subsection (a) of this section shall comply in all respects with the requirements of this chapter except that—

“(1) he may be naturalized regardless of age, and notwithstanding the provisions of sections 303 and 326 of this Act;

“(2) no declaration of intention, no certificate of arrival, and no period of residence within the United States or any State shall be required;

“(3) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner;

“(4) there shall be included in the petition the affidavits of at least two credible witnesses, citizens of the United States, stating that each such witness personally knows the petitioner to be a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States;

“(5) when serving in the military or naval forces of the United States, the service of the petitioner shall be proved either (1) by affidavits forming part of the petition, of at least two citizens of the United States, members of the military or naval forces of a noncommissioned or warrant

officer grade, or higher (who may be the same witness described in clause (4) of this subsection), or (2) by a duly authenticated certification from the executive department under which the petitioner is serving. Such affidavits or certifications shall state whether the petitioner has served honorably in an active-duty status during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946;

“(6) if no longer serving in the military or naval forces of the United States, the service of the petitioner shall be proved by a duly authenticated certification from the executive department under which the petitioner served, which shall state whether the petitioner served honorably in an active-duty status during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, and was separated from such service under honorable conditions; and

“(7) notwithstanding section 334 (c) of this Act, the petitioner may be naturalized immediately if prior to the filing of the petition the petitioner and the required witnesses shall have appeared before and been examined by a representative of the Service.

“(c) Citizenship granted pursuant to this section may be revoked in accordance with section 338 of this Act if at any time subsequent to naturalization the person is separated from the military or naval forces under other than honorable conditions, and such ground for revocation shall be in addition to any other provided by law. The fact that the naturalized person

was separated from the service under other than honorable conditions shall be proved by a duly authenticated certification from the executive department under which the person was serving at the time of separation."

PENAL PROVISIONS

NATURALIZATION AND CITIZENSHIP OFFENSES DESIGNATED AS FELONIES.

Sec. 346. (a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—(54 Stat. 1163; 8 U.S.C. 746.)

(1) Knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship. (54 Stat. 1163; 8 U.S.C. 746.)

(18) Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States. (54 Stat. 1165; 8 U.S.C. 746.)

▼

SECTION 307(a) NATIONALITY ACT OF 1940.

(54 STAT. 1142, 8 U.S.C. 707.)

Sec. 307. (a) No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. (54 Stat. 1142; 8 U.S.C. 707.)

No. 12,516

IN THE
United States Court of Appeals
For the Ninth Circuit

FOON GOON MOK,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT.

KENNETH C. ZWERIN,
625 Market Street, San Francisco 5, California,
Attorney for Appellant.

FILED

JUL 20 1950

PAUL P. O'BRIEN,

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No. 12,516

IN THE

**United States Court of Appeals
For the Ninth Circuit**

FOON GOON MOK,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT.

CONTENTIONS OF APPELLEE.

Appellee contends that moral character is a question of fact and that the petitioner under the section under which appellant filed his petition is required to show good conduct for a "reasonable period" of time *prior* to the filing of his application for naturalization and that appellant's conduct preceeding the filing of his petition does not meet the test of such a rule or, to put it another way, appellee argues that the District Court, in considering a petition under this section of the Nationality Act of 1940, which has deleted residential requirements, is permitted to consider petitioner's antecedent conduct and that appellant did not establish good moral character prior to the filing of his petition for naturalization.

ARGUMENT.

Appellee cites many cases to the effect that an applicant for citizenship has good moral character when his conduct conforms to generally accepted moral conventions current to the time. From these cases he concludes that appellant's actions in appearing as a witness upon his friend's petition for naturalization in 1946, his false statements concerning his marital status and appellant's various claims to birth in the United States, do not meet the test of this rule. Appellant first made his false claim to being born in the United States in 1942; his last such claim was made in August 1948. He appeared as a witness for another and claimed citizenship in 1946. His false information concerning his marital status was given when he entered the Army in 1942, before the American consul in 1947 and when he attempted to reenter the United States in August 1948. It thus appears that the false claim in support of his friend's passport application was made approximately three years before appellant filed his application for citizenship, his false claim of citizenship and marital status were last made in August 1948. The petition was filed six months later on February 28, 1949, and the hearing was had in December, 1949, a year and four months after appellant's last misconduct.

Without in any way minimizing appellant's actions in appearing as a witness in support of his friend's passport application in 1946, we respectfully urge that this act, occurring approximately three years before the filing of his application for naturalization, should not be a bar to the same.

The cases cited by appellee, commencing on page 12 of his brief, merely show that each petition must be decided on its own particular facts and all cases were under the "five year rule".

In *In re Bonner* (279 Fed. 789), the petitioner was arrested between the time the petition was filed and a hearing had at which time the court reserved judgment on the petition until after the petitioner had pleaded guilty.

In *Petition of Zele* (140 Fed. (2d) 773), the court stated:

"Under the law the burden is on the petitioner to establish good moral character *only* during the five year period, *not earlier*, and it has consistently been construed liberally so as to sanction forgiveness after the expiration of five years from the date of a disbarring misdeed." (Italics added.)

In *In re Paoli* (49 Fed. Sup. 128) the petitioner was convicted under the state law of violating a section of the California Alcoholic Beverage Act, a felony, and was granted three years probation. The record of conviction was subsequently expunged in accordance with the California law, and the court *admitted the petitioner to citizenship*.

In *Petition of Ledo* (67 Fed. Sup. 917), the petitioner made false claims to citizenship during the five-year period.

In re Bookschnis (61 Fed. Sup. 751), involved a petitioner who had been found guilty of violating the

Interstate Commerce Act in forty-two counts. The court held that "although there is necessity to maintain strict regulations of carrier lines and although a curb of rebating should be rigidly maintained there is no essential immorality involved in the actions of the defendant" and *granted* the petition for naturalization.

WHAT IS THE PRESCRIBED PERIOD DURING WHICH GOOD MORAL CHARACTER SHALL BE ESTABLISHED.

Appellee cites cases commencing on page 12 and again on page 15 of its brief which have been decided under the provisions of the Nationality Act which require five years of continuous United States residence and good moral character "during all the periods referred to." From these cases, some of which hold that the court may make inquiry previous to the five-year period and others of which hold that the facts developed by such an inquiry cannot be used as the basis for disqualification appellee argues that the court is not limited in its inquiry concerning a naturalization applicant's moral character to the period of residence required to be established. Appellee then concludes in the case of appellant, who is not required to establish any residence period, that the court can inquire concerning his conduct for a reasonable period of time prior to the date of his filing of his application for naturalization. The cases cited by appellee are not helpful in sustaining this conclusion.

In *In re Taran* (52 Fed. Sup. 535), the petition was filed three and one-half years after the petitioner was released from prison.

The petitioner in the *Petition of Gabin* (60 Fed. Sup. 750), during the five-year period prior to the filing of the application, performed no useful work nor labor and was supported either by relief agencies or his own family and had reached seventy years of age before making application for citizenship. The court observed that there was no "showing of conduct of a more positive nature or character indicative of a real apprehension of the obligations of citizenship or of sacrifices made or contributed to the public weal."

The petitioner in *In re Balestrieri* (59 Fed. Sup. 181) had been convicted of murder and sentenced to life imprisonment. The court impliedly held that he had been rehabilitated when it admitted him to citizenship.

In re Lipsitz (79 Fed. Sup. 954) involved a petitioner who had served ten years in prison for a crime of attempted extortion of money and also for assault in connection with a conspiracy to kidnap and the actual kidnapping of a young man. The court observed:

"Each case must be decided on its own particular facts."

The case *In re Laws* (59 Fed. Sup. 179) is not in point. In that case naturalization was sought under provisions of the law which permit the naturalization of aliens who marry citizens after one year of resi-

dence. The petitioner had been convicted of a crime of uttering false checks and had been discharged from parole during the five year period. The District Court judge properly held that such an alien must still prove good behavior for five years as "Congress clearly did not intend that the circumstance of marriage by an alien to an American citizen spouse should relieve a petitioner from substantial requirements of good behavior prescribed for all other aliens."

This is substantially different from the section under which appellant filed his petition which, from a reading of the Congressional Report which accompanied the bill, is a section to reward aliens who have served honorably in the Armed Forces by permitting them to acquire citizenship through naturalization without the necessity of going through certain processes required of non-service people.

Appellee agrees with appellant that there appears to be no reported case on the exact point as to what period of time the appellant, under the section under which he has applied for naturalization, must establish good moral character. It cites certain unreported cases, to which appellant does not have access, and all of which appear to be lower court cases.

It should be noted that in one case (Do Quay Lew) the application for citizenship was granted where the petitioner had falsely claimed United States citizenship six months prior to the filing of the petition. Do Quay Lew filed his petition under the same section as appellant and the Immigration Board of Special

Inquiry held that the petitioner's Army service outweighed in general his false testimony on the issue of his moral character. The decision of the Immigration Board of Special Inquiry should be persuasive in view of appellant's own excellent Army service record.

In another of the unreported cases cited in appellee's brief, that of Alexander Andrew Bariatinsky, the petitioner was granted citizenship four years after he had been denied naturalization by the United States District Court, and one year, or less, after his probation for criminal conviction based upon false claims to citizenship had expired. Appellee's brief, page 20, states Bariatinsky was convicted in 1946, placed on probation for two years and granted citizenship in April of 1949.

Thus from these unreported cases it can be seen that the decisions are in conflict as to what constitutes a reasonable time. In one case it is six months after a false claim to citizenship, in another three years after conviction and still another (Ming Fong Lee) the fact that two years had expired after his false claim to United States citizenship was deemed insufficient.

CONCLUSION.

Appellant respectfully submits that the affidavits that accompanied his petition and which stated that each of the affiants personally knew him to be a person of good moral character and his honorable discharge from the Army should, at the very least, be

prima facie evidence of good moral character. He respectfully urges that the order of the District Court denying his application for citizenship was improper and respectfully prays that its decision be reversed and he be admitted to United States citizenship.

Dated, San Francisco, California,

July 21, 1950.

Respectfully submitted,

KENNETH C. ZWERIN,

Attorney for Appellant.

No. 12,516

IN THE

United States Court of Appeals
For the Ninth Circuit

FOON GOON MOK,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

KENNETH C. ZWERIN,

625 Market Street, San Francisco 5, California,

*Attorney for Appellant
and Petitioner.*

FILED

FEB 28 1960

PAUL P. O'BRIEN,

CLERK

No. 12,516

IN THE

**United States Court of Appeals
For the Ninth Circuit**

FOON GOON MOK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

The petition of Foon Goon Mok, appellant herein,
respectfully represents:

That this is the first case before the above-entitled
court where the provisions of Section 324(a) of the
Nationality Act of 1940 as amended (8 U.S.C.
724 (A)) could be interpreted whereby counsel and
the lower court might have certain criteria or bases
upon which future petitions for naturalization might
be decided.

As pointed out in the brief for appellant (page 12)
no residence requirement is required under this sec-

tion, nor is there any prescribed period of time during which good moral character must be shown as a prerequisite to naturalization.

Nonetheless this court, in its opinion, states "The record contains an abundance of evidence from which such finding could be made", namely, that the petitioner "has failed to establish his good moral character for the required period of time".

What is that required period of time? Both the appellant and the appellee are in agreement that there are no reported cases on this exact point. The opinion of this court does not clarify this point, nor is it a guide for future cases.

Moreover, the opinion of this court conflicts with the case of *Do Quay Lew* (Appellee's Brief, p. 18) where citizenship was granted when the petitioner had falsely claimed United States citizenship six months prior to the filing of the petition. *Do Quay Lew* filed his petition under the same section as appellant.

At the time of the oral argument, one of the justices raised the point that the appellant had been guilty of making a false claim to citizenship six months prior to the time that appellant had filed his petition, and the justice intimated that that of itself showed bad moral character.

Appellant respectfully calls the attention of this court to his brief commencing on page 9 and ending on page 12, wherein he quotes a Board of Immigration Appeals decision which concludes "with each succeeding false claim being uttered merely to conceal previous statements respondent may be regarded as being

guilty in fact of but one such lapse, for which he has made amends."

This court remarked in *Jim Yuen Jung, Appellant v. Bruce G. Barber, Appellee* (No. 12,455) as follows:

"If it can be said that he claimed a false birthplace to gain admission to the army, that would not appear to be much different than claiming a false age in order to enter the army, a thing for which many have been highly praised."

This court held, in its opinion in the instant case, that the finding that petitioner "has failed to establish his good moral character for the required period of time" is not susceptible to the construction that it refers to petitioner's character at some period in the past. Appellant respectfully urges to the court that the finding is as confusing and ambiguous as the finding in the *Jim Yuen Jung* (supra) case, which this court reversed on October 4, 1950.

What is the required period of time? The designated Examiner (Appellant's Brief, p. 15) stated that the petitioner must show a good moral character *from the time of the filing of the petition to the date of the hearing*. The supervisor of Citizenship Certificate Unit of the Office of Adjudication, Immigration and Naturalization Service (Appellant's Brief, p. 14) wrote that the applicant need prove good moral character only for the required period of residence. In the Monthly Review of the Immigration and Naturalization Service an article appeared (Appellant's Brief, p. 14) that the appellant need only establish that he has been a person of good moral character during the abbreviated period of residence applicable to his class.

Appellant is not required to have any period of residence and comes within the purview of the bill, the purpose of which is to reward aliens who have honorably served in the armed forces by permitting them to acquire citizenship through naturalization without the necessity of going through certain processes required of non-service people.

Appellant respectfully submits that a rehearing be granted for the purpose of clarifying the law concerning the period prior to the filing of the citizenship application which the court has a right to consider in determining his good moral character.

Dated, San Francisco, California,
February 28, 1951.

KENNETH C. ZWERIN,
*Attorney for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL

Kenneth C. Zwerin, counsel for appellant herein, does hereby certify that in his judgment the petition for rehearing is well founded and that the same is not interposed for delay.

Dated, San Francisco, California,
February 28, 1951.

KENNETH C. ZWERIN,
*Counsel for Appellant
and Petitioner.*

No. 12517

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

HARVEY L. CARIGNAN, Appellant
vs.
UNITED STATES OF AMERICA, Appellee

**ON APPEAL FROM THE DISTRICT COURT FOR THE
DISTRICT OF ALASKA, THIRD DIVISION**

BRIEF FOR THE APPELLEE

J. EARL COOPER,
United States Attorney
Anchorage, Alaska
Attorney for Appellee

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In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12517

HARVEY L. CARIGNAN, Appellant

vs.

UNITED STATES OF AMERICA, Appellee

BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

The statement as to jurisdiction set forth in the Brief of Appellant is correct.

STATEMENT OF THE CASE

Appellant was indicted in the District Court for the District of Alaska, Third Division, for the crime of murder in the first degree, under Section 65-4-1, A.C.L.A., 1949. The indictment contained one count and charged that on or about the 31st day of July, 1949, at or near Anchorage, Alaska, Third Judicial Division, Territory of Alaska, appellant was engaged in an attempt to commit the crime of rape by forcibly and against her will attempting to carnally know and ravish one Laura A. Showalter, a woman, and that the appellant, while engaged in the attempt to commit such rape, by his actions killed Laura A. Showalter by beating her about the head and face with his fists.

This indictment was returned on the 12th day of October, 1949 (R.1). Thereafter and on the 14th day of October, 1949 appellant was brought before the court, and upon stating to the court that he had no money with which to pay counsel, Bailey E. Bell and James E. Weir were appointed and entered as counsel for the appellant (R.3). On October 15, 1949 Bailey E. Bell withdrew as co-counsel for appellant, and Harold J. Butcher was appointed and entered as co-counsel (R.4).

Appellant was arraigned on October 17, 1949, at which time the hour of 9:30 A.M. on October 24, 1949 was set as the time for appellant to enter his plea or otherwise move against the indictment (R.5). Appellant entered a plea of not guilty to the crime charged in the indictment on October 24, 1949 (R.6).

Thereafter appellant was tried by a jury and convicted of the crime of murder in the first degree as charged in the indictment (R.59). His motion for a new trial was denied (R.66). Subsequently, on the 20th day of December, 1949 the court pronounced the death sentence. This appeal followed.

STATEMENT OF FACTS

While the appellant's brief contains a Statement of Facts, it is deemed advisable to set forth a statement in this brief which more closely reflects the facts contained in the record and which is consistent with the verdict of the jury.

On the evening of July 31st, 1949 between 9:00 and

9:30 P.M. α Mr. Henry A. Keith passed by the vicinity of Ninth and A Streets on his way home. As he proceeded down A Street he noticed in the tall grass on his left α man and woman lying in the grass (T.T.P. 133). Mr. Keith paused briefly and the man rose up and told him to go on. There was no further conversation. The woman appeared to be lying still. Mr. Keith also observed at this time α red shoe lying in the street. He further noticed some children playing in the alley, one of whom had α bicycle (T.T.P.135). Leading from the spot in question to the road there appeared to be α swath or trail where the grass had been broken down, as though someone had been dragged over the grass. There were also what appeared to be heel marks at the side of the road (T.T.P.152). Mr. Keith proceeded on home and at approximately 6:00 o'clock the next morning, while on his way to town, he was curious about the incident the night before and paused briefly while passing the same vicinity, at which time he noticed α naked person lying in the identical spot in which he had seen the couple the previous evening. Mr. Keith immediately reported the matter to the police and together with them, returned to the scene.

At α subsequent date at α police line-up, Mr. Keith identified the man as the appellant, Harvey Carignan, and also at the time of giving his testimony in court pointed him out (T.T.P.137). Upon investigation, the officers discovered the partially clad body of α woman. There was α hat found near the scene with fresh blood stains on it (T.T.P.159), α red shoe in the

street and another one near the body, a pair of bifocal glasses. The glasses and shoes were identified by Mrs. Reddick, who knew Laura Showalter in life and who recognized the articles as being similar to those belonging to the victim (T.T.P.198).

Captain Barkdoll of the police force, who also investigated the scene of the crime that morning, stated that the body resembled that of a woman he had known in life as Mrs. Showalter, and there was contained in a small coin purse removed from the body, an identification of Mrs. Laura Showalter (T.T.P.205). There was also a social security card with the name Showalter on it (T.T.P.341).

The hat found at the scene was later identified by a witness, Kellner, as a hat identical to a hat worn by the appellant on the night of the murder, and a hat which had been previously seen on Carignan at the barracks where the appellant and the witness lived (T.T.P.285-289).

A pair of pants which had been borrowed from one Corporal Miller by the appellant the night of the murder was not directly returned to Miller, but when he next saw them, they had been sent to the cleaners and returned. It was indicated by the witness Martens, who is manager of a local cleaning establishment, testifying from his records, that Carignan had sent a pair of pants of that description to his place of business on August 1st (T.T.P.294-305).

At a later date, on the 16th of September, 1949, the appellant Carignan accompanied one Peterson, a

member of the C.I.D., to the city police station in connection with the investigation of assault with intent to commit rape on one Christine Norton. At that time the suspicions of the police were aroused as to the similarity of that case and the Showalter case, and the United States Marshal was advised accordingly (T.T.P.231).

At approximately 4:00 or 4:30 P.M. on September 16, 1949 a Deputy United States Marshal arrested the appellant, charging him with the crime of assault with intent to commit rape on Christine Norton, following which he was immediately arraigned before the United States Commissioner (T.T.P.231).

On the 19th day of September appellant gave a written statement to the U. S. Marshal Paul Herring (T.T.P.310), which statement was introduced at the trial over the objection of the appellant. Following the execution of this written statement, appellant also made certain oral admissions and voluntarily accompanied the officers to the scene of the crime, where he identified the scene and made certain other statements relative to his participation in the crime (T.T.P.338).

Following commission of the crime the appellant proceeded to Fourth Avenue, where he got a cab and proceeded to the railroad tracks at the edge of Fort Richardson, where he got out and walked to his barracks. (T.T.P.338). Upon arrival at the barracks his shirt was missing (T.T.P.338). Also, at the time of his arrival, his clothes were messed up and he had blood on him (T.T.P.384).

According to the affidavit of Dr. James E. O'Malley, who performed the post mortem on the body of the victim, she had been badly beaten, the nose had been shattered and fragments of the bone which make up its bridge were freely movable, the muscles on both sides of the head were found to be very bloody and bruised, and the skull was fractured. The primary cause of death was that of skull fracture, with a rupture of the middle meningeal arteries. (T.T.P.336-368).

ARGUMENT

FIRST POINT: 1. THERE WAS NO ERROR IN THE INDICTMENT RETURNED BY THE GRAND JURY IN FAILING TO PROVIDE AND NAME THE DISTRICT COURT FOR THE TERRITORY OF ALASKA

It is submitted that there is no merit to the contention raised by appellant under this point. Formerly under **Section 101, Title 48, U.S.C.** the provision reads as follows:

There is established a district court for the Territory of Alaska, with the jurisdiction of district courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes; * * *

However, it will be noted that Section 101 was subsequently amended by the enactment of **Public Law, June 25, 1948, Chapter 646, Sec. 9, 62 Stat. 986**, in which amendment we find the following language:

There is established a district court for the **DISTRICT OF ALASKA**, with the jurisdiction of district

courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes; * * * (Emphasis supplied).

It is therefore submitted that the caption set forth in the indictment is the correct caption under the law. However, if it were determined that the caption should be "District Court for the Territory of Alaska" rather than "District Court for the District of Alaska," it would result merely in a matter of error in form rather than substance and would come under the provision of **Rule 52 (a), Federal Rules of Criminal Procedure**, which provides that any error, defect, irregularity or variance which does not affect **substantial rights** shall be disregarded.

It will be further noted that in the body of the indictment the term "Territory of Alaska" is used.

In **Lowrey v U.S.**, 161 F.2d 30, C.C.A.8, at page 35, we find:

Failure of an indictment to state the county of the state where the offense was committed does not make the indictment fatally defective under the **Federal Rules of Criminal Procedure, 18 U.S. C.A.** following Sec. 687. Against a motion to dismiss, it is sufficient that the indictment show that the offense was committed within the territorial jurisdiction of the court before which the indictment was returned.

The indictment in this case meets that test.

SECOND POINT: 2. THE COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION FOR TRANSFER OF THE CASE TO ANOTHER JURISDICTION ON THE GROUNDS OF IMPOSSIBILITY TO HAVE A FAIR TRIAL IN THE THIRD DISTRICT COURT AT ANCHORAGE AS A RESULT OF LOCAL PREJUDICE.

In contending that the court erred in refusing to transfer this case on the grounds of prejudice, appellant states that it was impossible to draw a jury from the residents of the Anchorage area who would not be prejudiced against appellant, calling attention to various newspaper articles and radio broadcasts relative to the crime. This question was determined by this court in the case of **Shockley v. United States**, 166 F.2d 704, CCA 9. Part of the opinion of Justice Bone in that case is quoted:

Page 709.

Motions by appellants for a change of venue on the ground of local prejudice which made a fair trial impossible, were denied. See Rule 21, Rules of Criminal Procedure. An application of this character is addressed to the sound discretion of the trial court. (Cases cited). Venue is fixed by law. A proper showing and strict conformity with the statute are essential to a proper exercise of the power of the court to transfer the proceedings to another district or division. (Cases cited). * * * An attack was made by appellants on local newspaper and radio publicity given the Alcatraz prison break, but, as pointed out in **People v. Brindell**, 194 App. Div. 776, 185 N.Y.S. 533, 536, "If

newspaper articles furnished ground for removal, no defendant could ever be tried in this county for a spectacular crime."

In **Kersten v. U.S.**, 161 F.2d 337, C.C.A.10, the same question arose. The following is quoted from the court opinion at page 339:

Kersten filed a motion to transfer the proceedings to another district under Rule 21(a) of the **Federal Rules of Criminal Procedure**. He attached to the motion, copies of news items appearing in the Denver Post and the Rocky Mountain News, newspapers of general circulation throughout the District of Colorado, and copies of newscasts from Denver radio stations whose broadcasts reach all parts of the District of Colorado. * * * The motion was verified, and averred that the news items and newscasts had created such a prejudice against Kersten in the District of Colorado that it would be impossible for him to have a fair and impartial trial by a jury drawn from such District. It was also supported by affidavits. The United States introduced counter affidavits. The trial court denied the motion. A motion for a change of venue is addressed to the sound discretion of the trial court and, in the absence of an abuse of discretion, the denial of the application is not error.

The foregoing case was cited with approval by the Court of Appeals, District of Columbia, in **Dennis v. U.S.**, 171 F.2d 986.

The trial court, in the instant case, followed the same line or reasoning as set forth by the court in

U.S. v. Eisler, 75 Fed. Supp. 634, in the District Court for the District of Columbia, in which case a motion was made pursuant to the provision of **Rule 21, Federal Rules of Criminal Procedure**, on the grounds that there existed in the District of Columbia so great a prejudice against the defendant that he could not obtain a fair and impartial trial therein. In its opinion, at page 638, the court states:

It is the view of the Court that the publication of the newspaper articles referred to were presumably made in newspapers in the Southern District of New York as well as in the District of Columbia and they should have no effect upon the trial of the case, whether held in the District of Columbia or in the Southern District of New York, and it is not to be assumed that they will have any. The effect of such published articles on the executive order referred to in the motion upon anyone called to serve as a juror in this case is only speculative and cannot be dealt with until an examination of those called for service as jurors reveals whether or not a jury can be secured, no member of which is or is likely to be influenced thereby.

For these reasons the motion for transfer upon the first ground is denied without prejudice to a renewal of the motion on this ground at the trial if and when it appears that a fair and impartial jury cannot be secured.

It will be observed that upon examination of the jurors as to their qualifications to serve, in many instances the prospective jurors had gone no further than to scan the headlines. Others who had read the

newspaper articles had not formed any definite impressions (T.T.P.23-126). In view of appellant's contention on this point, it is rather interesting to note that two of the prospective jurors, Mr. Curtis (T.T.P.37-38) and Mary Ethel Price (T.T.P.56-58) were never questioned relative to the newspaper articles and radio broadcasts. It will be further noted that Juror Bertha Meier was excused by the court as being a friend of the victim (T.T.P.100), Florence Tibbs was likewise excused on the basis of entertaining an opinion (T.T.P. 103), Fred Moellendorf was excused on the basis that he knew the victim (T.T.P.111)), and Lionel Haakenson stated that as a result of the newspaper articles he had formed an opinion which he could not lay aside, and he was excused by the court (T.T.P.112-113).

It is obvious that those who had formed an opinion or for some reason entertained some doubt as to whether they could be fair jurors, frankly made that fact known to the court and accordingly were excused. An examination of this entire question refutes appellant's contention that it would be impossible for any juror to escape impressions from the newspaper articles.

Appellant makes considerable point of the examination of the juror, Mrs. Kauffman, and appellant lifts from the context one or two expressions used by Mrs. Kauffman as a basis for citing error on the court's part in refusing to grant his challenge. However, when her answers, taken as a whole, are examined, it is revealed that the court did not abuse its dis-

cretion in denying such challenge. We find the following expressions on the part of Mrs. Kauffman supporting the court's ruling: she stated that she could presume innocence (T.T.P.77); that she did not have an opinion either way (T.T.P.80); that if she were on trial or was representing the prosecution she would be willing to have one in her frame of mind sit as a juror (T.T.P.81); that she understood the presumption of innocence (T.T.P.82); that she had no opinion and is now able to presume innocence (T.T.P.83); and that she had no ideas which would prevent her from being impartial (T.T.P.84).

Section 66-13-37, A.C.L.A., 1949 provides as follows:

Challenge for actual bias. That a challenge for actual bias may be taken for the cause mentioned in the second subdivision of section 66-13-35. But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror can not disregard such opinion and try the issue impartially.

The court certainly did not abuse its discretion in this respect.

A similar matter came before the 7th Circuit Court in **Arnold vs. U.S.**, 7 F.2d 867 on almost identical facts. The court stated at page 869:

The competency of jurors is primarily a matter within the discretion of the court. (Cases cited). Nothing is disclosed which indicates that by this ruling the court's discretion was transgressed.

The contention on the part of appellant that individuals in Alaskan communities have a greater interest in local affairs than is the case in larger communities in the states proper, that newspapers of Alaskan communities are read more avidly than elsewhere, and that feelings, emotions, interests and sides are more readily developed than elsewhere, are pure assumptions on the part of appellant, not based on evidence or fact, have no place in appellant's brief, and should not be considered by this court.

In view of the foregoing it is obvious that the jury as finally empaneled was fair and impartial and without prejudice or bias.

THIRD POINT: 3. THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO DISMISS ON THE GROUNDS THAT HE HAD NOT BEEN GIVEN A PRELIMINARY HEARING AND WAS DENIED THE RIGHT OF COUNSEL, WHILE HELD IN CUSTODY DURING THE PERIOD UP TO HIS ARRAIGNMENT ON THE INDICTMENT.

In his argument under this assignment of error appellant states that he had been arraigned on the 16th day of September by the authorities and charged with assault with intent to commit rape on one Christine Norton and was taken before the United States Commissioner and Ex-Officio Justice of the Peace, where a preliminary hearing was held and the defendant in-

formed of the charges against him and advised of his rights (Appellant's Brief, p. 11).

We agree with that statement of facts. However, an examination of the testimony refutes the contention of the appellant that he was secretly interrogated from the 16th to the 19th of September in connection with the death of Laura Showalter. He was at no time under any restraint concerning the death of Laura Showalter prior to the 12th day of October, when he was formally charged with the crime set forth in the indictment. Obviously, then, he was not being held in connection with the charge contained in the indictment and there was no necessity for a preliminary hearing. As a matter of fact, there was no charge pending upon which a preliminary hearing could have been based.

Appellant advances a rather novel argument in connection with this point and cites **Federal Rules of Criminal Procedure, Rules 5(a) and (b)**. This rule has no application whatever to the circumstances in the instant case. It is not contended that upon his arraignment in connection with the Christine Norton case the defendant was not advised of his rights to have counsel and to the rights accorded a defendant charged with a crime. Nor is it contended that he was not immediately taken before a magistrate upon his arrest in the Christine Norton case. To the contrary, the evidence reflects that he was immediately taken before the Commissioner following his arrest in that case.

The crime upon which he was held, that is, assault with intent to commit rape, was a bailable offense, and he was free to go at any time he furnished such bail. All of his rights were fully accorded under the law at the time of his arraignment under the indictment charging him with murder, and not until such arraignment can it be argued that he at any time was restrained in connection with the crime charged in the instant case.

The fact that a person may be proceeded against in the first instance by indictment, without going through the formality of a complaint, arraignment and preliminary hearing, is so obvious as not to require argument. And while it is not too clear as to whether these particular circumstances presented themselves in the case of **Goldsby v. U.S.**, 160 U.S. 70, that fact can be inferred from the language of the court at page 73:

The contention at bar that because there had been no preliminary examination of the accused, he was thereby deprived of his constitutional guarantee to be confronted by the witnesses, by mere statement demonstrates its error.

So it is a proper conclusion that the defendant at no time was under any illegal restraint.

Appellant's further contention under this point that he was exposed to long, secret interrogation by the police authorities is contrary to all the facts appearing in the trial proceedings. This particular question, however, will be discussed at further length under Point 6 raised by appellant.

FOURTH POINT: 4. IT IS DENIED THAT THE VERDICT IS NOT SUPPORTED BY THE EVIDENCE.

Inasmuch as appellant has treated assignment 4 and 8 together, they will be so treated in this brief, and as to the

EIGHTH POINT: 8. THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHEN THE GOVERNMENT RESTED ITS CASE, ON THE GROUNDS THAT THE MATERIAL ALLEGATION OF THE INDICTMENT HAD NOT BEEN PROVED.

Appellant contends that the element of attempt to commit the crime of rape was entirely and wholly missing from the government's case (Appellant's Brief, p. 13).

While it is true that there was no direct evidence adduced at the trial establishing the fact that the appellant was engaged in an attempt to commit rape upon Laura Showalter at the time she met her death, nevertheless there were established ample facts and circumstances from which logical inferences to that effect could be drawn, and such logical conclusions are reflected in the verdict rendered by the jury.

The following facts were established: the position in which the witness Keith saw the appellant and his victim on the night of July 31, 1949—that of a man and woman lying in the grass (T.T.P.138); the pathway leading from the road to this particular spot having

the appearance of a body or object having been dragged over the grass (T.T.P.153); the heel marks or what appeared to be heel marks in the road (T.T.P.153); the nude condition of the body testified to by several witnesses (T.T.P.153, 202), all point to the crime of rape.

It will be further noted that according to defense witness Evans, on the evening in question the appellant had attempted to make a date with a middle aged woman who was an accordion player at the Scandinavian Bar where they were drinking (T.T.P.378, 379). That the appellant had definite sexual propensities was established by the defense itself on cross examination of witness Herring (T.T.P.359). And a careful examination of the entire record will reflect that any mention made with reference to the trial and conviction of appellant some time earlier of the assault with intent to commit rape upon Christine Norton was brought out by the defense itself.

The fact that a small diamond ring and gold nugget ear rings were found on the body (T.T.P.41), coupled with the fact that very shortly prior to the incident in question the appellant had received the sum of approximately \$30 for the exchange of a gun that he had bought a short time previously (T.T.P.378, 399), ruled out any question of robbery being the motive.

All of these factors, when taken together, lead inevitably to the logical conclusion that the appellant attempted to rape his victim at the time she met her death. This is the only conclusion that can be arrived at when considered in the light most favorable to the

government, the test applied in cases on appeal. The question of intent usually, of necessity, must be established by inferences drawn from circumstances and proven facts.

Appellant next complains that the body of the victim was not identified as that of Laura Showalter. However, here again the facts refute that contention. A red shoe in the street and another near the body and a pair of bifocal glasses were identified by the witness Mrs. Reddick, who knew Laura Showalter in life, as being similar to those belonging to the victim. (T.T.P.198). Captain Barkdoll of the police also recognized it as the body of the woman he had known in life as Mrs. Showalter. There was discovered on the body of the victim a small coin purse in which an identification of Mrs. Showalter was found (T.T.P.205). There was also a social security card with the name Showalter on it (T.T.P.341). An examination of the affidavit of Dr. O'Malley reveals that the body upon which he performed the autopsy was that of Laura Showalter (T.T.P.366). And as stated in the court's opinion as set forth in Appellant's Brief at page 14, there was sufficient evidence concerning the identity for the matter to go to the jury. All of this evidence, however, was subsequently supplemented by the introduction of a standard death certificate of Laura Showalter (T.T.P.402, 403).

FIFTH POINT: 5. THE COURT DID NOT ERR IN REFUSING TO PERMIT APPELLANT TO TAKE THE STAND AND TO TESTIFY AS A PRELIMINARY MATTER ON THE ADMISSIBILITY OF THE CONFESSION.

The court did not err in refusing the appellant the right to take the stand and to testify as a preliminary matter as to the admissibility of the confession. The witness Herring first talked with the appellant on the 17th day of September relative to making a statement, at which time appellant asked to see a priest. A priest was secured for him, and he and appellant had a conversation for approximately an hour, following which appellant agreed to make a statement. This statement was not made on the basis of questions and answers, but, to the contrary, the appellant requested and was given a pad of paper and pencils and, at his own desire, was placed in a cell by himself, at which time orders were given that he was not to be disturbed. He was further informed that after writing this statement he could tear it up if he did not wish to give it.

On Monday morning the appellant was again contacted by Marshal Herring, at which time he said that he had a statement prepared and expressed once again the desire to see the priest, and once again the priest was called and spent approximately an hour to an hour and a half with appellant.

Following this second visit of the priest, the appellant made the remark that there was nothing in it, referring to the statement. The statement, however, was

furnished and accounted for his activities until approximately 9:00 or 9:15 in the evening of the day of the crime. At this time he made the remark to the effect that he was afraid to put the rest of it down for fear he would not be believed and for fear that his neck would stretch. However, after a brief interview, Carignan agreed to write down the rest of the story. Upon surrendering this statement he was informed that he could still destroy it if he wished. No promises had been made to the appellant and he was never at any time threatened, but on the contrary, was treated in a humane and courteous manner (T.T.P.310-313).

Upon offer of the statement in evidence, counsel for appellant requested and was permitted to cross examine the witness Herring relative to admissibility of the statement. On cross examination, Herring's testimony was, in effect, as follows: that he had met Carignan on the Saturday afternoon of the 17th. At this time, together with Officer Miller, Carignan was advised of his rights. He told him that he did not have to make a statement at this time, that anything he said could be used against him, and that he was entitled to counsel if he so desired. At no time did appellant question him with respect to getting counsel (T.T.P.316-318). During the time that they were together, the appellant went into a discussion of his background. The appellant never, at any time, refused to make a statement (T.T.P. 319-320).

The first interview by Marshal Herring was concerned with the story of his early life (T.T.P.321). On

Sunday Marshal Herring stopped by the jail to see how Carignan was getting along. However, there was merely a brief exchange of greetings between the two on that occasion (T.T.P.324).

The appellant was re-interviewed by Herring on Monday, the 19th of September. At this time, in the presence of Officers Miller and Barkdoll, appellant was asked if he wished to give a statement, to which he replied no, that he wished to see the priest first. (T.T.P.326). After his visit with the priest and at the suggestion of Officer Barkdoll, the latter and Officer Miller left the room. Barkdoll had not attempted to get a statement from him nor, according to Herring's recollection, had Officer Miller (T.T.P.327).

Carignan had previously stated on several occasions that he had the fear that his neck would stretch, to which statements Herring replied that he could not promise him anything, but there had not been a hanging in this Division in 27 years. But as to what would happen to him, he could not promise. He made no promises that he would attempt to get his charge reduced. He did not threaten him that if he did not cooperate his neck would stretch. He did admit that Miller might have told the appellant that he, Herring, might be of some influence in helping him (T.T.P. 328). On one occasion when Carignan was in the office of Marshal Herring, his attention was attracted to a portrait, at which time the statement was made to him by Herring that he wondered what his Maker would think of him for doing this. He also stated that his Mak-

er might think more of him if he told the truth (T.T.P. 329). This was the only conversation relative to the religious pictures (T.T.P.330).

Herring did not tell him that he was well known by the authorities at McNeil Island nor that if he went to McNeil Island he might be of benefit in getting him a responsible place. He did not tell him that he was in a position to help men who went there.

Upon conclusion of the cross examination of Herring, a request was made by counsel for appellant to put Carignan on the stand and examine him on the circumstances surrounding the taking of this statement. This offer was denied by the court, and the statement was admitted in evidence.

It will be noted that both direct and cross examination relative to the admissibility of the statement were made in the presence of the jury without any objection by appellant. The statement itself, for the most part, dealt with the general activities of the appellant during the day in question. Near the close of the statement, however, he admitted hitting a woman in the nose and the next thing he remembered was sitting and hitting a woman in the face with his fists, and upon realizing what he was doing, he wanted to run and get away from there. The statement concluded by saying that Marshal Herring had made no promises or threats and that he believed he needed medical attention and should receive it before being allowed to go out in public. (T.T.P.337).

Following admission of the statement, the witness Herring continued to testify relative to oral admissions by the appellant which went much further in connecting him with the crime than did the written statement. Testimony concerning these matters was made without any objection on the part of counsel for appellant (T.T.P.338-340).

There is ample authority for the proposition that when there is a conflict as to whether the confession is voluntary, the matter should go to the jury. Had the court acceded to appellant's request and permitted him to take the stand, and had the appellant testified to facts which would have made it appear that the confession was not voluntary, he would have been in no better position than he was under the court's ruling, for under the latter circumstances, the court would still have been required to submit the matter to the jury. The law is well settled that when there is a conflict as to the admissibility of a confession, its voluntariness is to be determined by the jury.

In **Tooisgah vs. U.S.**, 137 F.2d 713, CCA 10, at page 716, the court in its opinion, citing the case of **People v. Farmer**, gives the following quotation:

The civilized conduct of criminal trials cannot be confined within mechanical rules (Cases cited).

and goes on in its own language to say:

Law suits are not tried by the square and compass, but by the trial judge's innate sense of justice. To be sure, he is guided by certain instru-

ments called rules, but rules measure only the boundaries beyond which the ends of justice may not be reached.

To have required the court in this instance to have permitted the appellant to take the stand on the question of the admissibility of the confession would have been tantamount to confining the court to purely mechanical rules.

It is assumed, of course, that the appellant would have requested his examination in the absence of the jury. Otherwise, he would have taken the stand in his own defense, which he did not do.

The matter of the admissibility of a confession is within the sound discretion of the court. In reviewing the circumstances under which the statement in question was made, there is not the slightest evidence that it was anything but voluntary or that it was prompted by any consideration other than that the appellant had a desire to get this awful matter off his conscience.

According to the case of **Cohen v. U.S.**, 291 F. 368, cited by appellant in his brief at page 19, the court declares the principle that if the testimony of the government tends to show that the alleged confession is made voluntarily in a legal sense, then no matter how heavily the testimony for the defendant as to the character of the confession may contravert that of the government, the confession is *prima facie* admissible as evidence.

SIXTH POINT: 6. THE COURT DID NOT ERR IN ADMITTING THE CONFESSION INTO EVIDENCE.

An examination of the record will reflect that there is not the least merit to the contention on the part of the appellant that the confession admitted into evidence was not a voluntary confession. Either the appellant is not familiar with the transcript of the trial proceedings, or he has placed an extremely strained construction upon what appears therein.

The facts as revealed by the transcript concerning the circumstances surrounding the making of the confession are set forth in the argument under the 5th Point of this brief, and nothing would be gained by repeating them here.

However, attention of the court is once again drawn to the fact that under cross examination of the witness Herring as to the admissibility of the statement and the cross examination proper, and under further direct examination without objection on the part of appellant, the witness went much further in relating admissions of the appellant than were contained in the written statement.

The appellant identified the hat in question and admitted that he got it from a buddy by the name of Conrad Sylveste, another soldier at Fort Richardson, (T.T.P.338). He voluntarily accompanied the officers to the scene of the crime and pointed out the place where he came to, pounding the victim in her face (T.T.P.339). He admitted that he had been dressed in a pair of

pants that had been dyed darker but could not account for what became of the khaki shirt which he was wearing that evening. He did retrace his steps, going over the route from the scene of the crime to his barracks at Fort Richardson, accompanied by the officers (T.T.P.340). Witness Herring further testified that at neither interview was the appellant kept later than perhaps 6:00 or 7:00 o'clock in the evening (T.T.P.357).

Counsel for appellant also elicited through cross examination various sexual aberrations on the part of the appellant. At this point the court intervened, but counsel insisted that he thought the matter was relevant (T.T.P.359). Further testimony revealed that the appellant, after leaving the Territory of Alaska, had sought a return to his army post at Adak with the thought that he might get over his abnormal sexual tendencies, and reenlisted in the army with that thought in mind (T.T.P.361). This substantiates the statement contained at the end of his written confession relative to the fact that he thought he needed medical attention before he was allowed to go out in public.

The courts seem to have applied two general principles relative to the admissibility of confessions. Under one principle, the object seems to be to exclude statements which are false because they were obtained by promises or threats or hope or fear, and that under such circumstances, the temptation to speak falsely is so great as to render the statement entirely untrustworthy. **Wigmore On Evidence, Sec. 822.**

The other principle of exclusion established by the Supreme Court in various decisions is that no person shall be compelled in a criminal case to be a witness against himself. Under the latter, it is quite possible that statements which are true might be excluded. **Wigmore On Evidence**, Sec. 823.

When these tests are applied to the confession in the instant case, it is apparent that it falls far short of coming within either one of these principles of exclusion. As set forth in an opinion by Justice Bone in the case of **Symons v. U.S.**, CCA 9, 178 F.2d 615, at page 619, 620:

Involuntary confessions obtained by duress or threats or undue psychological pressures, and voluntary confessions obtained after the detention has become illegal, are equally inadmissible in the federal courts. (**McNabb v. United States** 318 U.S. 332 and **Upshaw v. United States**, 335 U.S. 410) * * *

The cases cited by appellant are not controlling here because the facts in those cases in no wise are similar to the facts with which we are here concerned. There is no disagreement about the general statement of law contained in those cases, however.

In **Pass v. U.S.**, CCA 9, 256 F. 731, at page 732 the court declares:

The mere fact that Pass was in custody when he made the statements and that they were answers to questions put by the agents did not make such admission involuntary. In **Bram v. United States**, 168 U.S. 532, cited by defendant, the facts were

very different. There the accused was in actual custody, was stripped of his clothing, and was nagged and told by the detectives that an eye-witness charged him with guilt, and that if he had an accomplice he should say so, and not have the blame of the "horrible crime" on his own shoulders. In **Hopt. v. Utah**, 110 U.S. 574, the court, in discussing the admissibility of a confession, said:

"The admissibility of such evidence so largely depends upon the special circumstances connected with the confession, that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed in the first instance, to the judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely foreborne to mark with absolute precision the limits of admission and exclusion. **Sparf v. United States**, 156 U.S. 51."

It has been repeatedly held that the mere fact a defendant is in custody will not render the confession inadmissible. **Young, et al., v. Territory of Hawaii**, 9th Cir., 163 F.2d 490; **U.S. v. Marshall**, 322 U.S. 69; **Lyons v. Oklahoma**, 322 U.S. 601; **Ziang Sung Wan v. U.S.**, 266 U.S. 1.

Nor does this case come within the rule laid down in **Watts v. Indiana**, 338 U.S. 49 cited by appellant. The same is true in the case of **McNabb v. U.S.**, *supra*. It is submitted that the appellant is in error in contending that in the **McNabb** case the defendants were taken promptly before a magistrate, for the substance of the ruling in that case is that the confessions were improp-

erly admitted because of holding and interrogating the defendants without carrying them forthwith before a committing magistrate as the law commands. It may be further pointed out that in the McNabb case the situation was aggravated by continuous questioning for many hours by numerous officers.

Nor do the circumstances surrounding the confession in the instant case fall within the strict rule laid down in the case of **Upshaw v. U.S.**, *supra*, which apparently is the latest expression by the Supreme Court on this question.

There is no basis whatever for appellant's contention that the confession by the appellant was procured by prolonged and continuous secret interrogation, promises, inducements and psychological pressure.

The appellant is dealing in considerable speculation in attempting to place an inference upon the words of Mr. Herring that Officer Miller probably made promises to the appellant. As stated in **Morton v. U.S.**, 147 F.2d. 28, at page 31:

* * * Skilled lawyers, advised by their clients, make their decisions upon these questions, in view of their familiarity with the facts and the law. It is not the function of appellate courts to retry cases upon the intangibles involved in evidence which might have been, but was not, introduced at the trial.

Both Officer Miller and Officer Barkdoll were under subpoena by the government and were available to

be called in behalf of appellant, had he been serious in the contention which he now makes.

The contention that there was psychological pressure exercised by virtue of calling the appellant's attention to certain religious plaques in the office of the Marshal, as set forth on page 21 of appellant's brief, is another example of lifting expressions from the context, for an examination into that matter will reveal that the incident concerning the religious plaques was to the effect that the witness Herring asked Carignan if he knew who the portrait on the wall was, followed by the statement that he wondered what his Maker would think of him for doing this, and that his Maker might think more of him if he told the truth about this (T.T.P.329).

And that was the extent of any conversation relative to the religious plaques. It amounted to no more than a solicitation to tell the truth, which has been determined by the courts as not being an improper inducement to render objectionable a confession thereby obtained unless threats or promises are applied. **Martin v. U.S.**, CCA 4, 166 F.2d 76, 79. **Murphy v. U.S.**, CCA 7, 285 F. 801, at page 811, states:

The expressions, "better tell the truth" and "better be frank" and "it will be best for you to tell the truth" have been before the courts on many occasions, and the majority have held them not sufficient to defeat the admission of the confession.

A mere hope of lighter punishment not based on

definite promises is not sufficient to render a confession inadmissible. **U.S. v. Lolardo**, 67 F.2d. 883, at page 885, Judge L. Hand states as follows:

The authorities are so many and so varied that we are of necessity confined to those in the federal courts which alone are authoritative for us. The leading case is **Bram v. U.S.**, 168 U.S. 532 * * * In spite of the court's treatment of those decisions as a safeguard * * * we do not believe that it meant to commit itself to the doctrine that the mere hope of a lighter punishment shall exclude a confession.

There is no presumption against a confession. **Gray v. U.S.**, CCA 9, 9 Fed. 2d 337. At page 339, Judge Gilbert in his opinion states:

It is the rule in the federal courts that the fact that a confession is made by an accused person, even while under arrest, or when drawn out by the questions of an officer, does not necessarily render it involuntary. There is no presumption against a confession and no burden upon the government to establish its voluntary character. **Murphy v. United States**, 285 Fed. 801, 807; **Sparf v. United States**, 156 U.S. 51; and **Perovich v. United States**, 205 U.S. 86, 91.

This same point is made in **Hartzell v. United States**, 72 F.2d. 569, in which case certiorari was denied, 298 U.S. 621. At page 577 of that decision Judge Gardner in treating upon this question, says:

In the federal courts there is no presumption against voluntary character of a confession, and

the burden is not on the government in first instance to show its voluntary character. Citing **Gray v. United States** 9 F.2d, 337; **Wigmore On Evidence**, 2nd Edition, Sec. 860.

Certainly, the mere fact that the appellant was confined at the time is not a sufficient reason for contending that the confession was not voluntary. **Evans v. U.S.**, 122 F.2d 461. **U.S. v. Gottfried**, 165 F.2d 360, cert. den. 68 Supreme Court 738.

It is apparent from all of the facts that the trial court, in ruling upon the admissibility of the purported confession, had a right to believe that the weight of his load, and not inducements, threats or compulsion of any kind, caused the appellant to speak.

SEVENTH POINT: 7. THE COURT DID NOT ERR IN DENYING THE APPELLANT THE RIGHT TO CALL WITNESSES FOR HIS DEFENSE ON THE BASIS THAT HE WAS AN INDIGENT DEFENDANT AND HAD NO MEANS TO SECURE WITNESSES.

The appellant is obviously basing this assignment on a false premise, for the court at no time denied the appellant the right to call witnesses, but to the contrary, indicated its willingness to do so upon proper showing by the appellant as required by **Rule 17(b) of the Rules of Criminal Procedure** (T.T.P.349-353). At no time did the appellant comply with the provisions of this rule. The affidavit in question went no further than to state, "These individuals will be called upon

to testify on the behalf of the defendant and specifically to his activities as they observed them on the 31st day of July" (R.28). It is well settled that in order to take advantage of the foregoing rule, an indigent defendant must make the proper showing. In **U.S. vs. Best**, 76 Fed. Supp. 138, the court states at page 139:

This motion lies within the discretion of the court. **Goldsby v. U.S.**, 160 U.S. 70. **Crompton v. U.S.** 138 U.S. 361. Construing R.S. Sec. 878 (**28 U.S. C.A., Sec. 656**), of which present Rule 16(b) is an enlargement.

The court goes on further to state:

With respect to named United States citizens allegedly living somewhere in the United States, there is no proper showing in defendant's motion under Rule 17(b) to warrant the court in issuing a subpoena for any of the witnesses named.

The motion is denied.

While the case of **Thomas, et al., vs. United States**, CCA 5, 168 F.2d 707, is not exactly in point, the court did state at page 708:

On the main point of this nature relied on that in connection with his motion to have witnesses summoned at government expense, appellant's counsel was required to give the United States Attorney a statement as to what the testimony of each witness would be, the record is completely silent as to any complaint made below or any exception taken to the requirement. If there was error, therefore, appellants are not in a position to complain of it, but it was not error.

The ruling in that case is significant in view of the language of the court at T.T.P. page 350:

* * * but the rule requires that he set forth what the witnesses that he wishes to subpoena will testify to. The court can't tell from an affidavit in such general language as this one whether their testimony is material or not, and the further reason for that requirement is that the United States Attorney may elect to stipulate that if the witnesses were produced, they would testify to that effect. Now, he can't stipulate to anything here. * * *

At no time did the appellant here make such a showing which could have been a basis for such stipulation.

In **Flynn v. U.S.**, CCA 9, 172 F.2d 12, this court was confronted with a similar question. Quoting from page 14:

Before the date set for the trial of the case appellant made a motion for the issuance of a subpoena under Rule 17, Rules of Criminal Procedure, and for a continuance, but the court denied without prejudice. All of these motions were denied, and we think properly so.

A recent case is that of **Meeks v. U.S.**, CCA 9, 179 F.2d 319, which case was based on an appeal from the District Court of Alaska, Division One, Judge George W. Folta presiding, who was the same judge who sat in the trial of the instant case. The court declared as follows at page 321:

Appellant, by motion, requested the trial court to summon at government expense three witnesses, Trafton, Mathewson and Peterson. The motion was denied and appellant assigns such denial as error. Rule 17(b) of **The Federal Rules of Criminal Procedure**, 18 U.S.C.A., requires motions of this character to be supported by an affidavit containing certain information. So far as the record shows, the required affidavit was not filed although the trial court requested appellant to do so. Appellant having failed to comply with the law, the court was not required to order the issuance of the desired subpoenas. (Cases cited). The rule also gives the trial court discretion in ordering the procurement of witnesses at government expense. No abuse of discretion was shown. **Austin v. United States**, 9 Cir., 19 F.2d 127, certiorari denied 275 U.S. 523, and **Dupuis v. United States**, 9 Cir., 5 F.2d 231.

The appellant here further requested the court for an adjournment or continuance of the trial until he had an opportunity to contact the witnesses and secure the information upon which to base the necessary affidavits. The court denied this request upon the grounds that there had been no showing of diligence and that there had been no compliance with the law (T.T.P.369). It is submitted that the court's ruling on this matter was correct.

In **Goldsby v. U.S.**, *supra*, at page 72, we find:

That the action of the trial court upon an application for continuance is purely a matter of discretion not subject to a review by this court unless

it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question.

There is no showing here that the trial court abused this discretion in this respect.

EIGHTH POINT: 8. THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHEN THE GOVERNMENT RESTED ITS CASE, ON THE GROUNDS THAT THE MATERIAL ALLEGATION OF THE INDICTMENT HAD NOT BEEN PROVED.

This assignment was covered in connection with the argument under assignment 4, *supra*.

NINTH POINT: 9. THE COURT DID NOT ERR IN PERMITTING THE WITNESS, GARNER, TO TAKE THE STAND IN THE GOVERNMENT'S REBUTTAL TESTIMONY.

NINTH POINT: 9(α). NO PREJUDICE WAS INSTILLED IN THE MINDS OF THE JURORS BY THE QUESTIONS ASKED BY THE UNITED STATES ATTORNEY OF THE WITNESS, GARNER.

Points 9 and 9(α) will be here considered together as was done in appellant's brief. The appellant's case consisted entirely of an attempt to establish the fact that appellant was intoxicated at the time the crime was committed (T.T.P. 374-396). It was obviously proper on the rebuttal for the government to adduce testimony as to the appellant's sobriety. This was attempt-

ed by calling the witness, Francis E. Garner, who is erroneously referred to in appellant's brief as Gardner. From the statement made by the United States Attorney (T.T.P.407), and from the questions put to the witness, there can be no doubt but that the appellee was attempting to establish the fact that appellant was sufficiently sober to recall the incident of appellant's conduct with the victim, Mrs. Showalter, on the night in question (T.T.P.412).

It is obvious from the answers given by the witness, Garner, that he either had no recollection of the conversation he had with appellant concerning this matter, or that he had become a hostile witness. It is difficult to ascertain from the answers given by Garner which of these was the case (T.T.P.407-417). From an examination of this entire question it is apparent that the appellee expected to adduce from the witness, Garner, the fact that he had had a conversation with the appellant from which conversation the appellant recalled certain incidents of the night in question which would refute any question of his intoxication. The fact that the appellee was not successful in this attempt cannot be cited as error.

In the case of **Madden v. U.S.**, CCA 9, 20 F.2d 289, it appears that the circumstances were similar to those involved here. At page 293 the court, in its decision, stated:

To nearly all of the numerous questions put to him he answered he did not remember, or was not sure, or that he could not identify the person or

the circumstance. Under these circumstances, we do not think it was error for the court to permit the government to make the attempt to show that there were such transactions as were referred to in the inquiry, and that they had to do with the operations of the Principio within the scope of the alleged conspiracy. And error is not to be predicated upon the attempt, merely because it was unsuccessful.

In **Goldsby v. U.S.**, *supra*, at page 74 the court declared:

The government called a witness in rebuttal who was examined as to the presence of the defendant at a particular place at a particular time to rebut testimony which had been offered by the defendant to prove the alibi upon which he relied. This testimony was objected to on the ground that the proof was not proper rebuttal. The court ruled that it was and allowed the witness to testify. It was obviously rebuttal testimony; however, if it should have been more properly introduced in the opening, it was purely within the sound judicial discretion of the trial court to allow it, which discretion, in the absence of gross abuse, is not reviewable here. (Cases cited).

It is submitted that the court in the instant case did not abuse its discretion in this respect.

The contention of the appellant that the attempt of the appellee to refresh Garner's recollection on the conversation in question with the appellant by asking questions concerning, and calling the witness's attention to, a statement which he had previously made in

connection with this matter, is not error. This is particularly true in view of the appellant's constantly bringing to the jury's attention the previous incident of appellant having been arrested in connection with a crime of assault with intent to commit rape on one Christine Norton, and by further eliciting from the witness Paul Herring that the appellant, during his early life, had committed certain acts of sex perversion. In view of this, the appellant certainly was not prejudiced in the eyes of the jury by the questions asked the witness Garner.

However, if it were determined that such questions were prejudicial, the error, if any, was cured by the court's striking all the questions and answers in connection with this matter and instructing the jury to disregard the entire incident (T.T.P.417).

TENTH POINT: 10. THE COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY THAT NO CONSIDERAION COULD BE TAKEN IN THE JURY'S DELIBERATION BECAUSE OF THE FAILURE OF THE APPELLANT TO TAKE THE STAND AND TESTIFY IN HIS OWN BEHALF.

The appellant, in the instant case, made no request for any such instruction, and it can be assumed that the trial court felt that by giving such instruction, in the absence of a request by appellant, it would be unduly drawing the attention of the jury to the fact that the appellant did not testify.

The case of **Robilio v. U.S.**, 291 F. 975, cited by appel-

lant, is not in point. The question there involved was relative to the improper comment by the prosecuting attorney relative to the failure of the defendant to take the stand.

In **Michael v. U.S.**, 7 F.2d. 865, cited by appellant, the defendant had requested an instruction in connection with his failure to take the stand. The court, however, in that case, went further, at page 866:

I am not to be understood, however, as indicating to you the view that an uncontradicted fact in the case is to be looked upon by you, in view of anything which I have said on this subject in any other light than as an uncontradicted fact.

* * * There seems to be a difference of opinion among the judges and the bar as to whether such reference to the accused's failure to testify helps or injures him before the jury. Some courts have gone so far as to criticize the trial judge for giving such an instruction in the absence of a request. There is always a possibility of the jury's misunderstanding the court's reference to the defendant's failure to testify, and it is entirely proper to add that which is here criticized.

In neither the case of **U.S. v. Wilson**, 149 U.S. 60 nor **Shay v. U.S.**, 251 F. 440, is the case in point, as both of those cases dealt with the question of comments by the district attorney on the failure of the defendant to testify.

In **Becker v. U.S.**, 5 F.2d. 45, at page 49, Judge Learned Hand includes the following language in his opinion:

In his charge the learned trial judge, without request from the defendant, mentioned the fact that the defendants had not taken the stand. With some elaboration, he instructed the jury that no inference of guilt could be drawn from this. Becker now urges that any allusion to the fact was reversible error. **It is no doubt better, if a defendant requests no charge upon the subject, for the trial judge to say nothing about it.** (Emphasis supplied).

In the case of **Bradford v. U.S.**, 129 F.2d. 274, error was assigned because no instruction was given as to defendant's failure to take the stand, and the court said at page 278:

The court below did not err in not charging the jury with reference of Will Bradford to take the witness stand in his own behalf. Bradford did not request an instruction. In this instance it was better for the court not to mention the matter.

In **Yoffe v. U.S.**, CCA 1, 153 F.2d, 570, at page 576:

Appellant claims that the court erred in failing to give several instructions, although no requests for such instructions had been made. Only rarely will a trial court's judgment be reversed for failure to give instructions in the absence of a seasonable request or exception. (Cases cited). And then only if the failure to instruct constitutes a basic and highly prejudicial error. (Case cited).

Goldsby v. U.S., *supra*, while not directly in point, does contain some persuasive language, at page 77:

The four errors assigned as to the charge of the court do not complain of the charge intrinsically

but are based upon the assumption that, although correct, it was misleading and tended to cause the jury to disregard the testimony offered by the defendant to establish an alibi. But the charge in substance instructed the jury to consider all the evidence and all the circumstances of the case, and if a reasonable doubt existed, to acquit. If the accused wished specific charges as to the weight in law to be attached to testimony introduced to establish an alibi, it was his privilege to request the court to give them. No such request was made, and, therefore, the assignments of error are without merit.

Attention is also directed to **Section 66-13-51, A.C.L.A., 1949, Section 7:**

At the conclusion of the arguments the court shall charge the jury, which charge shall be reduced to writing by the court and a copy of such instructions shall be given to the counsel for each of the parties, plaintiff and defendant, provided, however, at the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time, copies of such requests shall be furnished to the adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. * * *

Appellant did not comply with this provision of the code.

ELEVENTH POINT: 11. THE COURT DID NOT FAIL TO ALLOW ANY TIME BETWEEN THE FURNISHING OF COPIES OF INSTRUCTIONS TO THE JURY AND THE READING OF SAID INSTRUCTIONS TO THE JURY FOR REVIEW BY APPELLANT'S COUNSEL AS TO POSSIBLE ERRORS OF LAW AND LACK OF APPROPRIATE INSTRUCTIONS, THUS HANDICAPPING APPELLANT'S COUNSEL MATERIALLY IN THE TAKING OF EXCEPTIONS TO THE INSTRUCTIONS AND THE PRESENTING OF ADDITIONAL INSTRUCTIONS.

No argument is presented by appellant under this assignment (Appellant's Brief, p. 27), nor does the record anywhere support his contention.

TWELFTH POINT: 12. THE COURT DID NOT ERR IN PERMITTING THE GOVERNMENT TO REOPEN ITS CASE TO PRESENT ADDITIONAL EVIDENCE IN CHIEF WITHOUT SHOWING GOOD REASON THEREFOR AS REQUIRED BY LAW.

While the appellant under this assignment presents no argument, it is felt that the court might be interested in a few brief remarks in that respect.

In the case of **Haugen v. U.S.**, CCA 9, 153 F.2d 850, at page 851, we find:

After both government and defense had rested the parties briefed the question whether secondary evidence with certain facts respecting the provisions of a government contract later considered

should have been admitted. The court filed an opinion setting forth in effect that the plaintiff had failed to present the best evidence available to him and that it should have sustained the objection to the introduction of such testimony. The court went on to say that without such evidence plaintiff has failed to sustain its burden of proof that the Olympic Commissary was an agency of the United States and that the counterfeiting of its meal ticket was calculated to defraud the United States. Therefore, the action must be dismissed.

Five days later the prosecution moved to reopen the case and proposed to submit the evidence which the court stated in its opinion it seems not unreasonable to require. The motion was granted and the trial proceeded.

At page 852:

No such finding of not guilty having been made here, it was within the discretion of the trial court to reopen the case after submission by both parties.

While this was a case heard by the court in the absence of a jury, the same principles of law pertain.

In **Burke v. U.S.**, CCA 9, 58 F.2d 739, at page 741:

After the government rested its case the court permitted the case to be reopened and additional evidence to be introduced on the subject of variance. It is claimed that this was error. As it was a matter wholly within the discretion of the court, there is no merit in the contention.

In *Lutch, et al., vs. U.S.*, CCA 9, 73 F.2d 840, the court states in its opinion, at page 841:

There is no assignment or specification of errors set out in appellant's brief, but in an assignment of errors in the transcript of record signed by defendant's attorney it is claimed that the court erred in allowing the government to reopen its case after both defense and government had rested, in order to put in evidence that defendant William Andrews' true name was Soderstrum. There is nothing in this assignment, as it is within the discretion of the trial court as to whether the case should be reopened to receive new evidence. It was competent to show that the appellant was living under an assumed name at the time he engaged in the distilling business.

It is submitted that the trial court in the instant case did not abuse its discretion in that respect.

THIRTEENTH POINT: 13. THE COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURORS ON THE QUESTION AS TO THE AUTHENTICITY OF THE CONFESSION AND THE METHOD BY WHICH THE CONFESSION WAS PROCURED.

There is no question but what the court is required to instruct on the whole law of the case, and we find no disagreement with appellant's citations on that point. However, in the instant case there was no occasion for the court to instruct on the admissibility of the confession in view of all the evidence concerning

the circumstances of making it and the absence of any conflicting evidence in that regard.

In **Raarup v. U.S.**, CCA 5, 23 F.2d 547, the court said:

But where the confession is clearly voluntary, and there is nothing in the evidence which would justify the jury in finding otherwise, it is no error to refuse to instruct the jury that they may disregard on a finding of involuntariness.

In **Gray v. U.S.**, *supra*, the court stated at page 340:

The court might properly, if requested by the plaintiff in error, have instructed the jury that the confession must have been voluntarily made in order to be considered by them. But no such request was made.

In **Lewis v. U.S.**, 9th Cir., 74 F.2d 173, at page 179, the court stated:

The appellant has made no attempt to point out in what respects the evidence introduced before the jury concerning the involuntary character of the confession justified the submission of that question to the jury. All the references to the transcript in appellant's brief are to the evidence taken during the absence of the jury. We have, nevertheless, examined the testimony before the jury and find nothing in the evidence presented to them which would justify or require the submission of the question of the competency of the evidence of confession to the jury.

In view of the foregoing, it is submitted that the court committed no error in failing to instruct in this matter, in the absence of a request to do so.

FOURTEENTH POINT: 14. THE COURT DID NOT ERR IN FAILING TO REMOVE JURORS FOR CAUSE WHEN JURORS INDICATED THAT THEY HAD FORMED AN OPINION PRIOR TO THE TRIAL.

In appellant's statement of points relied on, at page 5 of appellant's brief, he assigns as error, failure to remove jurors for cause when jurors indicated that they had formed an opinion prior to the trial. This contention is so wholly lacking in merit that the appellant did not see fit to argue the point, and we shall therefore not consider it, with the exception of calling the court's attention to the examination of the jurors in the argument under the 2nd point of this brief.

CONCLUSION

An examination of the entire record fails to reveal any error on the part of the court which would warrant a reversal. The appellant had a fair and impartial trial and was ably represented by two attorneys. The court was fair and impartial. No legitimate reason exists for upsetting the verdict of the jury, and it is respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

J. EARL COOPER,
*United States Attorney,
Anchorage, Alaska
Attorney for Appellee.*

No. 12518

United States
Court of Appeals
for the Ninth Circuit.

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellant,

vs.

JOHN S. BROWN,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon.

FILED

JUN 16 1957

PAUL P. O'BRIEN,

No. 12518

United States
Court of Appeals
for the Ninth Circuit.

TIGHE E. WOODS, Housing Expediter, Office of
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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In the District Court of the United States
for the District of Oregon

No. 4366 Civ.

TIGHE E. WOODS, Housing Expediter,
OFFICE OF THE HOUSING EXPEDITER,
Plaintiff,

vs.

JOHN S. BROWN,
Defendant.

COMPLAINT FOR
INJUNCTION AND RESTITUTION

Comes Now plaintiff above named and alleges:

I.

That plaintiff is the duly appointed and qualified Housing Expediter, Office of Housing Expediter, an agency of the United States government, created by the Veterans' Emergency Housing Act of 1946 as amended (50 U.S.C.A. App. Sec. 1821 et seq.), and brings this action as such Housing Expediter pursuant to the Housing and Rent Act of 1947 (50 U.S.C.A. App. Sec. 1881-1902) as extended and amended by Public Laws 422 and 464 of the 80th Congress, hereinafter referred to as the Act.

II.

That jurisdiction of this action is vested in the above entitled Court under Sec. 206(b) of the Act.

III.

That at all times herein mentioned, John S.

Brown, has been the landlord and operator of two certain housing accommodations situated as follows, 2122-2126 S. E. Belmont, in the City of Portland, Oregon, and within the Portland-Vancouver Defense-Rental Area.

IV.

That in the opinion of the Housing Expediter, defendant has violated the provisions of the Act and of the regulations issued pursuant thereto, in that he has demanded, collected and received from tenants occupying the accommodations hereinbefore described, rentals in excess of the Maximum Legal Rentals fixed and established by law for such accommodations; that the overcharges herein complained of are as follows, to-wit,

1. That the accommodation situated at 2126 S.E. Belmont Street, Portland, Oregon, was occupied by Mrs. John Scoggan, as tenant, from and including the 1st day of May, 1948, to and including the 1st day of January, 1949.

(a) That the Maximum Legal Rent for said accommodation during the period above described was the sum of \$27.20 per month.

(b) That for each and every month of said occupancy, landlord John S. Brown, demanded and collected from Mrs. John Scoggan, the sum of \$35.00 per month, constituting an overcharge of \$7.80 per month or a total overcharge for said period in the amount of \$70.20.

2. That the accommodation situated at 2122 S.E. Belmonth Street, Portland, Oregon, was occupied

by Mrs. Aubrey B. Brown, as tenant, from the 1st day of March, 1948, to and including the 1st day of January, 1949.

(a) That the Maximum Legal Rent fixed and established by law for said accommodation during said period was the sum of \$25.70 per month.

(b) That for each and every month of said period the landlord John S. Brown, demanded and collected from the tenant, Aubrey B. Brown, the sum of \$45.00 per month, constituting an overcharge of \$19.30 per month or a total overcharge of \$212.30.

V.

That plaintiff is informed and, therefore, believes and alleges that said landlord, John S. Brown, has continued to overcharge the two tenants above named, in the amounts as above stated, for rental subsequent to January 1st, 1949.

Wherefore Plaintiff prays:

1. For temporary and permanent restraining Order, restraining and enjoining the defendant, John S. Brown, his agents, employees, servants and associates, or anyone acting for or on his behalf, from demanding, collecting, receiving or retaining rentals for any of the housing accommodations situated at 2122-2126 S.E. Belmont Street, Portland, Oregon, in excess of the Maximum Legal Rentals fixed and established by law.

2. For an Order of Restitution, requiring and directing the defendant, to restore and repay to plaintiff for restitution to Mrs. John Scoggan the

sum of \$70.20, plus any additional overcharges made subsequent to January 1st, 1949.

3. For an Order of Restitution requiring and directing the defendant to restore and repay to plaintiff for restitution to the tenant, Mrs. Aubrey B. Brown, the sum of \$212.30, plus any additional overcharges made subsequent to January 1st, 1949.

4. Plaintiff further prays for his costs and disbursements herein.

5. Plaintiff further prays that in the event, or for any reason tenants above named are not entitled to restitution herein prayed for, that such restitution shall be made to the Treasurer of the United States.

Dated at Seattle, Washington, this 9th day of February, 1949.

/s/ C. E. KNOWLTON, JR.

/s/ ROY C. FOX,

Attorneys for Plaintiff.

/s/ FLOYD D. HAMILTON,

Assistant U. S. Attorney.

/s/ N. RAY ALBER.

Duly verified.

[Endorsed]: Filed Feb. 10, 1949.

[Title of District Court and Cause.]

ANSWER

For answer to Plaintiff's complaint, Defendant admits, denies and alleges as follows:

I.

Admits the allegations of Paragraph I.

II.

Denies all of the rest of the allegations contained in said complaint except as hereinafter admitted or alleged.

III.

Defendant affirmatively alleges that from a date prior to March 1, 1948, to and including November 30, 1948, he was the owner and landlord of the property located at 2122-2126 S. E. Belmont Street, in the City of Portland, Oregon, and within the Portland-Vancouver Defense Rental Area; that said property included four housing accommodations; that the property located at 2126 S. E. Belmont Street was occupied by Mr. and Mrs. John Scoggan as tenants, that shortly prior to July 1, 1948, Defendant determined that he would remodel said apartment, dividing the same up into two housing accommodations and so notifying the tenants, advising them that it would be necessary for them to vacate. Said tenants offered to pay the Defendant the sum of \$35.00 per month as rental on said premises and in further consideration of the Defendant's forbearing making the contemplated

alterations and evicting them; that thereafter from July 1 through November 30, 1948, Defendant would forbear making said alterations and would receive from the tenant, in consideration thereof and in payment of rent, the sum of \$35.00 for the months of July, September, October and November, 1948.

The premises located at 2122 S. E. Belmont Street were occupied from March 1, 1948, through November 30, 1948, by Mr. and Mrs. Aubrey B. Brown as tenants; that prior to March 1, 1948, said tenants offered to pay Defendant rental and to re-decorate the premises to suit their own tastes and desires, in aggregate value equivalent to \$45.00 a month; that Defendant accepted said proposition and between the dates of March 1, 1948, and November 30, 1948, did receive from the tenants the sum of \$. . . . in cash and said tenants did carry out certain decoration and alteration projects in said premises for which Defendant issued receipts in the amount of \$45.00 for each month.

IV.

On the first day of December, 1948, the Defendant sold said property to one Harry A. DeVries, by contract, a copy of which is on file herein with Defendant's request for admissions and it is by this reference made a part of this answer, and under the terms of said contract the purchaser H. A. DeVries is entitled to possession and control of the premises from and after December 1, 1948,

and Defendant has no right or interest therein except a security interest under said contract.

Wherefore, Defendant prays that Plaintiff take nothing by his complaint and that the same be dismissed.

Dated at Portland, Oregon, this 8th day of April, 1949.

/s/ McDANNELL BROWN,
Attorney for Defendant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed April 12, 1949.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

This case prays for "restitution" of \$70.20 to one tenant, \$212.30 to another, and for an injunction.

At the argument I asked able counsel for the Expediter a question that has been in my mind for some time. I asked him how the Expediter intended to enforce orders for "restitution," whether by execution, as on the usual money judgment, or by invoking the court's contempt power. He answered the latter. Since I consider this would be imprisonment for debt, which I abhor, the order for restitution is denied.

The defendant has sold the premises, so an injunction to control defendant's future conduct is

not needed. Some time ago I denied an injunction for the same reason in a Wages and Hours case. There the defendants had sold his sawmill. And see a decision in one of the recent advance sheets by Honorable John E. Miller, one of the United States District Judges for Arkansas.

Judgment for defendant for the reasons stated.

Dated June 15, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 15, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter first came on for hearing before the Court without a jury on March 21, 1949, on defendant's motion to dismiss plaintiff's complaint, plaintiff appearing by his attorney of record, Roy C. Fox, defendant appearing by his attorney, McDannell Brown, and after hearing the arguments of counsel, the Court's decision was reserved; that thereafter, on March 31, 1949, the Court's decision on defendants' motion to dismiss plaintiff's complaint was reserved to time of pre-trial conference or trial.

Thereafter, this cause came on for hearing before

the Court on the 16th day of May, 1949, on plaintiff's motion for summary judgment, plaintiff appearing by his attorney, Roy C. Fox, defendant appearing by his attorney, McDannell Brown, and after hearing the arguments of counsel, the Court reserved its decision; that thereafter, the Court entered its Order on the 25th day of May, 1949, denying plaintiff's motion for summary judgment.

That thereafter, this cause came on for trial without a jury on June 6, 1949, plaintiff appearing by his attorney, Roy C. Fox, defendant appearing in person and by his attorney, McDannell Brown at which time, testimony of witnesses and documentary evidence were introduced and after hearing the arguments of counsel, the Court reserved its decision.

That thereafter on June 15, 1949, this Court rendered the following Memorandum of Decision:

"This case prays for 'restitution' of \$70.20 to one tenant, \$212.30 to another, and for an injunction.

"At the argument I asked able counsel for the Expediter a question that has been in my mind for some time. I asked him how the Expediter intended to enforce orders for 'restitution,' whether by execution, as on the usual money judgment, or by invoking the court's contempt power. He answered the latter. Since I would consider this would be impirsonment for debt, which I abhor, the order for restitution is denied.

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not needed. Some time ago I denied an injunction for the same reason in a Wages and Hours case. There the defendant had sold his sawmill. And see a decision in one of the recent advance sheets by Honorable John E. Miller, one of the United States District Judges for Arkansas.

“Judgment for defendant for the reasons stated.

“Dated June 15, 1949.

/s/ CLAUDE McCOLLOCH,
Judge”

That on or about the 29th day of July, 1949, plaintiff filed herein a motion to reconsider the Memorandum Opinion which said motion was argued on September 6, 1949; said motion to reconsider was by oral order of the Court denied November 25, 1949, and the Court having considered all matters and the testimony of witnesses and the arguments of counsel and being fully advised in the premises, now makes the following

Findings of Fact

I.

That plaintiff is the duly appointed and qualified Housing Expediter of the Office of the Housing Expediter, an agency of the United States Government created by the Veterans Emergency Housing Act of 1946 as amended and brings this action pursuant to the Housing and Rent Act of 1947 as amended.

II.

That jurisdiction of this action is conferred upon this Court by Section 206(b) of the Act.

III.

That at all times from the 1st day of March, 1948, to and including the 1st day of January, 1949, the defendant John S. Brown, was the landlord and operator of a certain controlled housing accommodation situated at 2126 S. E. Belmont Street and 2122 S. E. Belmont Street, in the City of Portland, Oregon, within the Portland-Vancouver Defense-Rental Area.

IV.

That the accommodation situated at 2126 S.E. Belmont Street, Portland, Oregon, was occupied by Mrs. John Scoggan as a tenant from and including the 1st day of May, 1948, to the 1st day of January, 1949; that during each and every month of said period, the defendant collected and received from said tenant for the use and occupancy of said accommodation, rental in the amount of \$35.00 per month; that the Maximum Legal Rent for said accommodation during all of said period was the sum of \$27.20 per month as established by law, constituting an overcharge of \$7.80 per month or a total overcharge for said period in the amount of \$70.20.

V.

That the accommodation situated at 2122 S.E. Belmont, Portland, Oregon, was occupied by Mrs. Aubrey B. Brown as a tenant from the 1st day of

March, 1948, to the 1st day of January, 1949; that during each and every month of said period, the defendant collected and received from said tenant for the use and occupancy of said accommodation, rentals in the amount of \$45.00 per month; that the Maximum Legal Rent for said accommodation during all of said period was the sum of \$25.70 per month, constituting an overcharge of \$19.30 per month or a total overcharge for said period of \$212.30.

VI.

That on or about the 1st day of December, 1948, defendant sold the properties situated at 2122 S.E. Belmont, and 2126 S.E. Belmont, Portland, Oregon, and made no collection of rental subsequent to the month of December, 1948, and that defendant is not now a landlord engaged in the business of renting housing accommodations, from which Findings of Fact, the Court makes the following

Conclusions of Law

I.

That plaintiff's prayer for restitution in the above case must be denied for the reason that the granting of restitution would constitute imprisonment for debt.

II.

That plaintiff's prayer for an injunction be denied for the reason that the defendant is no longer a landlord engaged in the business of renting housing accommodations.

Done in Open Court this 18th day of February, 1950.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

Presented by:

/s/ ROY C. FOX,
Attorney for plaintiff.

[Endorsed]: Filed Feb. 18, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter first came on for hearing before the Court without a jury on March 21, 1949, on defendant's motion to dismiss plaintiff's complaint, plaintiff appearing by his attorney of record, Roy C. Fox, defendant appearing by his attorney, McDannell Brown, and after hearing the arguments of counsel, the Court's decision was reserved; that thereafter, on March 31, 1949, the Court's decision on defendant's motion to dismiss plaintiff's complaint was reserved to time of pre-trial conference or trial.

Thereafter, this cause came on for hearing before the Court on the 16th day of May, 1949, on plaintiff's motion for summary judgment, plaintiff appearing by his attorney, Roy C. Fox, defendant appearing by his attorney, McDannell Brown, and after hearing the arguments of counsel, the Court

reserved its decision; that thereafter, the Court entered its Order on the 25th day of May, 1949, denying plaintiff's motion for summary judgment.

That thereafter, this cause came on for trial without a jury on June 6, 1949, plaintiff appearing by his attorney, Roy C. Fox, defendant appearing in person and by his attorney, McDannell Brown at which time, testimony of witnesses and documentary evidence were introduced and after hearing the arguments of counsel, the Court reserved its decision.

That thereafter on June 15, 1949, this Court rendered the following Memorandum of Decision:

"This case prays for 'restitution' of \$70.20 to one tenant, \$212.30 to another, and for an injunction.

"At the argument I asked able counsel for the Expediter a question that has been in my mind for some time. I asked him how the Expediter intended to enforce orders for 'restitution,' whether by execution, as on the usual money judgment, or by invoking the court's contempt power. He answered the latter. Since I would consider this would be imprisonment for debt, which I abhor, the order for restitution is denied.

"The defendant has sold the premises, so an injunction to control defendant's future conduct is not needed. Some time ago I denied an injunction for the same reason in a Wages and Hours case. There the defendant had sold his sawmill. And see a decision in one of the recent advance sheets

by Honorable John E. Miller, one of the United States District Judges for Arkansas.

“Judgment for defendant for the reasons stated.

“Dated June 15, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.”

That on or about the 29th day of July, 1949, the plaintiff filed herein a motion to reconsider the Memorandum Opinion which said motion was argued on September 6, 1949; said motion to reconsider was by oral order of the Court denied November 25, 1949, and the Court having considered all matters and the testimony of witnesses and the arguments of counsel and being fully advised in the premises, now makes the following

Findings of Fact

I.

That prior to the first day of December, 1948, defendant John S. Brown sold the properties situated at 2122 S. E. Belmont and 2126 S. E. Belmont, Portland, Oregon, the same being the properties referred to in the plaintiff's complaint; that since said first day of December, 1948, he has not been a landlord of said premises nor engaged as landlord in the business of renting housing accommodations.

From the foregoing Findings of Fact, the Court makes the following

Conclusions of Law

I.

That there is no basis or justification for the exercise of the equitable jurisdiction of this Court.

II.

That plaintiff's prayer for an injunction should be denied for the reason that defendant is no longer a landlord engaged in the business of renting housing accommodations, and such relief would therefore be futile and meaningless.

III.

That plaintiff's prayer for restitution should be denied for the reason that the defendant is no longer a landlord engaged in the business of renting housing accommodations and that such relief would exercise no restraining purpose on the defendant or serve any other equitable purpose, and for the further reason that enforcement of such a judgment by a contempt proceedings would result in imprisonment for debt, thus making this Court an instrument of inequity and injustice.

Done in Open Court this 18th day of February, 1950.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

[Endorsed]: Filed Feb. 18, 1950.

In the District Court of the United States
for the District of Oregon

No. 4366

TIGHE E. WOODS, Housing Expediter, Office
of the Housing Expediter,

Plaintiff,

vs.

JOHN S. BROWN,

Defendant.

JUDGMENT

This matter was tried before the Court on the 6th day of June, 1949, without a jury, plaintiff appearing by his attorney of record, Roy C. Fox, defendant appearing in person and with his attorney, McDannell Brown, and the Court having heard the testimony of witnesses and considered documentary evidence introduced and having made and entered herein its Findings of Fact and Conclusions of Law and being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that plaintiff's prayer for restitution in the above-entitled action be and the same is hereby denied.

It Is Further Ordered that plaintiff's prayer for injunction against defendant be and the same is hereby denied.

It Is Further Ordered that the above-entitled action be and is dismissed without costs to either party to which judgment plaintiff excepts and exception allowed.

Done in Open Court this 18th day of February, 1950.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

[Endorsed]: Filed Feb. 18, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Tighe E. Woods, Housing Expediter, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 18th day of February, 1950.

/s/ ROY C. FOX,
Attorney for Plaintiff.

Service accepted.

[Endorsed]: Filed March 29, 1950.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Appellant designates the following portions of the record and proceedings to be contained in the record on appeal in this action:

- (1) Complaint.
- (2) Defendant's Answer to Complaint.
- (3) Memorandum of Decision.

- (4) Findings of Fact and Conclusions of Law prepared by plaintiff, filed February 18, 1950.
- (5) Findings of Fact and Conclusions of Law prepared by defendant, filed February 18, 1950.
- (6) Judgment.
- (7) Notice of Appeal.
- (8) Statement of Points on which Appellant intends to Rely.
- (9) This Designation.

/s/ ROY C. FOX,

Attorney for Plaintiff.

Service accepted.

[Endorsed]: Filed March 29, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

The point upon which appellant intends to rely
(1) on this appeal is as follows:

(1) The Court erred in denying plaintiff's prayer for restitution of rental overcharges in the above-entitled case.

/s/ ROY C. FOX,

Attorney for Plaintiff.

Service accepted.

[Endorsed]: Filed March 29, 1950.

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint for injunction and restitution, Answer, Memorandum of Decision, Findings of Fact and Conclusions of Law (2), Judgment, Notice of Appeal, Designation of Record on Appeal, Statement of Points on Which Appellant Intends to Rely, Transcript of Docket Entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 4366, in which Tighe E. Woods, Housing Expediter, is plaintiff and appellant and John S. Brown is defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 7th day of April, 1950.

LOWELL MUNDORFF,
Clerk.

[Seal] By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 12518. United States Court of Appeals for the Ninth Circuit. Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, Appellant, vs. John S. Brown, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed April 10, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 12518

**In the United States Court of Appeals
for the Ninth Circuit**

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT**

v.

JOHN S. BROWN, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON**

BRIEF FOR APPELLANT

ED DUPREE,

General Counsel.

LEON J. LIBEU,

Assistant General Counsel.

LOUISE F. MCCARTHY,

Special Litigation Attorney,

Office of the Housing Expediter, Washington 25, D. C.



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In the United States Court of Appeals for the Ninth Circuit

No. 12518

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT**

v.

JOHN S. BROWN, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON*

BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION

Plaintiff appeals from a final judgment denying restitution of rent overcharges to tenants and injunctive relief in an action brought pursuant to Section 206 of the Housing and Rent Act of 1947, as amended (50 U. S. C. App. 1881, et seq.) (R. 18). The Complaint was filed February 10, 1949 (R. 5). Defendant moved to dismiss. Decision on the motion was reserved until pretrial conference (R. 14). Defendant's answer was filed April 12, 1949 (R. 8). On May 3, 1949, plaintiff moved for summary judgment which was denied on May 25, 1949 (R. 10). Judgment was entered on February 18, 1950 (R. 18), after a

trial on the merits and the entry of Findings of Fact and Conclusions of Law (R. 11). Notice of Appeal was filed on March 29, 1950 (R. 19). Jurisdiction of the District Court is conferred by Section 206 of the Housing and Rent Act of 1947. Jurisdiction of this Court is conferred by Section 1291 of the Judicial Code (28 U. S. C. 1291).

STATEMENT OF THE CASE

Tighe E. Woods, Housing Expediter, plaintiff below, appeals from a final judgment of the United States District Court for the District of Oregon (R. 18) entered on February 18, 1950, which judgment denied the prayers of plaintiff for (1) an injunction against future violations of the Housing and Rent Act of 1947 and (2) an order of restitution of amounts collected as rent overcharges from two tenants. The Complaint which was filed on February 10, 1949 (R. 2) alleged that defendant was the landlord of two controlled housing accommodations located at 2122 S. E. Belmont Street and 2126 S. E. Belmont Street, Portland, Oregon in the Portland-Vancouver Defense-Rental Area (R. 3); that defendant had violated the provisions of the Housing and Rent Act of 1947, as amended, and the regulations issued pursuant thereto by collecting rents in excess of the maximum legal rentals for each of the above housing accommodations (R. 3); that defendant had collected \$35.00 per month from Mrs. John Scoggan, occupant of the housing accommodations at 2126 S. E. Belmont Street from May 1, 1948 to January 1, 1949 (R. 3); that the

maximum legal rent for said housing accommodations was \$27.20 per month so that the overcharge for nine months for 2126 S. E. Belmont Street was \$70.20 (R. 3); that defendant had collected \$45.00 per month from Mrs. Aubrey B. Brown, occupant of the housing accommodations at 2122 S. E. Belmont Street from March 1, 1948 to January 1, 1949 (R. 4); that the maximum legal rent for said housing accommodations was \$25.70 per month so that the overcharge for eleven months for 2122 S. E. Belmont Street was \$212.30 (R. 4); and that the total overcharge was \$282.50.

Plaintiff prayed for restitution of overcharges to the tenants and for an injunction against future violations (R. 5). After trial without a jury on June 6, 1949 (R. 15), the trial court found as a fact that the overcharges had been made by defendant as alleged (R. 12) and that the defendant no longer owned the housing accommodations (R. 13).

As Conclusions of Law the Court held that the prayer for an order of restitution must be denied for the reason that the granting of restitution would constitute imprisonment for debt (R. 13). It held further that the injunction should be denied because the defendant was no longer a landlord (R. 13). Judgment was entered on February 18, 1950 (R. 14). Plaintiff appeals from that part of the judgment which denied restitution to the tenants since it was based solely on the conclusion of law that the granting of such restitution would constitute imprisonment for debt (R. 13).

SPECIFICATIONS OF ERROR

I

The District Court erred in holding that the granting of restitution would constitute imprisonment for debt.

II

The District Court erred in denying an order granting restitution of rental overcharges because in so doing it deprived the Housing Expediter of a remedy to which he was entitled and allowed defendant to retain the money by which he had been unjustly enriched.

III

The District Court erred in denying restitution.

SUMMARY

Appellant contends that the trial court should be reversed because it was in error in concluding as a matter of law that the granting of an order of restitution would constitute imprisonment for debt. There is no danger of imprisonment for failure to obey an order of restitution through inability to perform. Financial inability is a valid defense to an order of restitution of money. The Court should have vindicated the public interest under an emergency statute by granting restitution when it was sought by a public official as an aid to enforcement of the federal law. The issuance of an order of restitution would place on defendant the burden of proving his inability to pay which is proper. But if he established such inability there would be no imprisonment. Accord-

ingly, the Court erred as a matter of law in denying relief on the ground that granting an order of restitution would constitute imprisonment for debt.

ARGUMENT

Appellant, plaintiff below, alleges as error only the refusal by the Trial Court to grant restitution of rental overcharges to the two tenants who occupied the housing accommodations owned by defendant, and as to whom overcharges were proved, on the ground that the granting of restitution would constitute imprisonment for debt (R. 13). The refusal to grant an injunction against future violations is not assigned as error in view of the fact, established at the trial, that appellee no longer owns the housing accommodations. However, restitution may be granted without an injunction (*Woods v. Richman*, 174 F. 2d 614 (C. A. 9); *Woods v. Gochnour*, 177 F. 2d 964 (C. A. 9)).

Appellant, therefore, presents the following argument.

The District Court erred in concluding as a matter of law that the granting of restitution would constitute imprisonment for debt

The contention that an order of restitution would constitute imprisonment for debt cannot be sustained. It has been recently rejected by the Courts of Appeals for the Sixth and Eighth Circuits. In the Sixth Circuit the question arose in the case of *Woods v. Budd*, 179 F. 2d 244, in which the Trial Court denied an order of restitution of rental overcharges where

the defendant had defaulted and the Housing Expediter failed to show her inability to pay. The Court of Appeals reversed the Court below without opinion other than instructions to enter an order of restitution against defendant. It has followed the same procedure in a group of five later cases similarly disposed of by the same trial judge. (See *Woods v. Edgell*, No. 11018; *Woods v. Ferguson*, No. 11019; *Woods v. Palicka*, No. 11020; *Woods v. Owsley*, No. 11021; and *Woods v. Koogle*, 180 F. 2d 1022 in the United States Court of Appeals for the Sixth Circuit.)

The sole question in those cases was of whether or not defendant would be imprisoned for debt. It was fully discussed in the Housing Expediter's brief and on the argument. The same principle was clearly stated in the second Warner Holding Company case, *Warner Holding Company v. Creedon*, 166 F. 2d 119 (C. A. 8). The Supreme Court had determined in the case of *Porter v. Warner Holding Company*, 328 U. S. 395, that restitution was a proper equitable remedy. The case was then remanded to the District Court which ordered defendants to make restitution of the rental overcharges to the tenants. The defendants on a further appeal contended that they were unable to comply with the court's order and would, therefore, be imprisoned for debt contrary to the Constitution of the United States. The Court of Appeals for the Eighth Circuit rejected this contention stating (at p. 122):

Nor does it appear from anything in the record that the defendant's officers are presently or that they will be at any time in the future

threatened with an unconstitutional imprisonment. They are in no danger of punishment by imprisonment for failure to perform the order of restitution where performance is impossible, and where they in good faith make a reasonable effort to comply with the court's order. *Chapman v. United States*, 8 Cir., 139 F. 2d 327, 331; *McGarry v. Securities and Exchange Commission*, 10 Cir., 147 F. 2d 389, 392, 393; *Hagen v. Porter*, 9 Cir., 156 F. 2d 362, 366; *Cooper v. Dasher*, *supra*, 290 U. S. page 110, 54 S. Ct. page 7, 78 L. Ed. 203.

The case of *Chapman v. United States*, 139 F. 2d 327, 331 (C. A. 8), cited above contains the following statement to the same effect:

Concerning appellant's final contention that the judgment of the District Court ordering him to pay the amount found by the court to be owing by him to the market administrator for the producer-settlement fund is void, because exposing the appellant to imprisonment for debt in violation of the statute of the United States (28 U. S. C. A. § 843), and contrary to Article 2, Section 16, of the Constitution of the State of Missouri, Mo. R. S. A., it is sufficient to say that there is nothing in the record to indicate that appellant is unable to pay the judgment against him, or even that he is unwilling to pay it if the judgment of the court below is in accordance with the law. Specific enforcement of the marketing orders is authorized by the Marketing Agreement Act, 7 U. S. C. § 608a (6), and mandatory injunctions requiring handlers to make payments of amounts due from them under marketing orders of the Secretary have received approval

by the courts of the United States. *United States v. Rock Royal Co-Op., Inc., et al.*, and other cases cited *supra*. The appellant has not been imprisoned, nor threatened with imprisonment, and, if his contention is well founded, we may not suppose that the District Court will attempt to enforce its judgment by unlawful or unconstitutional means. It will be time enough for the appellant to raise this point when the unlikely contingency occurs or is threatened.

In the instant case the Trial Court denied restitution for the sole reason that to grant restitution would constitute imprisonment for debt (R. 13). If the restitution order is granted, defendant, if able to pay, will be compelled to do so or suffer the penalty attached to contempt of court. But if unable to pay, he will not be imprisoned for debt since inability to pay is a valid defense to a contempt proceeding (Cf. *Maggio v. Zeitz*, 333 U. S. 56). This is the type of case where the defendant has the key to the jail in his own pocket. Thus, if the defendant is not financially able to make restitution he will lose nothing by the entry of an order directing him to make restitution. It is only when he fails to obey the order that plaintiff will be entitled to apply for a rule requiring him to show cause why he should not be held in civil contempt.

E. Ingraham Co. v. Germanow et al., 4 F. 2d 1002 (C. A. 2).

Coca-Cola Co. v. Feulner, 7 F. Supp. 364 (S. D. Tex.).

The Supreme Court has held that restitution of rental overcharges is an equitable remedy which may

be employed by the courts of the United States in bringing about compliance with emergency legislation affecting the economy of the nation. In *Porter v. Warner Holding Co.*, *supra*, p. 402, the Supreme Court said:

* * * When the Administrator seeks restitution under § 205 (a), he does not request the court to award statutory damages to the purchaser or tenant or to pay to such person part of the penalties which go to the United States Treasury in a suit by the Administrator under § 205 (e). Rather he asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant. Such action is within the recognized power and within the highest tradition of a court of equity. Thus it is plainly unaffected by the provisions of § 205 (e).

The order of the Trial Court in this case not only disregarded the public interest but in the face of the Supreme Court's holding on the propriety of an order of restitution condemned it in effect as an unconstitutional exercise of power.

Accordingly, the Court below was clearly in error in denying restitution upon the ground that to grant it would constitute unlawful imprisonment for debt. The premise being false, the ruling based thereon must likewise fall unless there are other reasons assigned for the conclusion reached. Since there are no other grounds stated, the judgment below must be reversed with instructions to grant the relief prayed for in the Complaint.

CONCLUSION

It is respectfully submitted that the judgment should be reversed and the case remanded to the Court below with instructions to grant the order of restitution as prayed for in the Complaint.

Respectfully submitted.

ED DUPREE,

General Counsel,

LEON J. LIBEU,

Assistant General Counsel,

LOUISE F. MCCARTHY,

Special Litigation Attorney,

Office of the Housing Expediter,

Washington 25, D. C.

No. 12518

United States
COURT OF APPEALS
for the Ninth Circuit

TIGHE E. WOODS, Housing Expediter,
Office of the Housing Expediter,
Appellant,

-VS-

JOHN S. BROWN,
Appellee.

BRIEF FOR APPELLEE

Appeal from the United States District Court for the
District of Oregon.

McDANNELL BROWN,
Equitable Building,
Portland 4, Oregon,
Attorney for Appellee.

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No. 12518

United States
COURT OF APPEALS
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TIGHE E. WOODS, Housing Expediter,
Office of the Housing Expediter,
Appellant,

-vs-

JOHN S. BROWN,
Appellee.

BRIEF FOR APPELLEE

Appeal from the United States District Court for the
District of Oregon.

STATEMENT OF JURISDICTION

Jurisdiction of the United States District Court for the District of Oregon in this case is not disputed. The basis of jurisdiction is set forth in Appellant's Brief.

STATEMENT OF THE CASE

The statement of the case as set forth in the Appellant's Brief (pp. 2 and 3) is not only incomplete but in

one important particular is incorrect. Appellant states in his Brief (p. 3):

“Plaintiff appeals from that part of the judgment which denied restitution to the tenants since *it was based solely on the conclusion of law that the granting of such restitution would constitute imprisonment for debt* (R. 13).” (Emphasis supplied.)

After the conclusion of the trial and the rendition of the Court’s Memorandum Opinion the Plaintiff on July 29, 1949 filed a motion to reconsider the Memorandum Opinion, which motion was argued and considered by the Court on September 6, 1949, and denied by an oral order dated November 25, 1949 (R. 16).

Thereafter the Court made Findings of Fact including the following:

“That since said 1st day of December, 1948 he (defendant) has not been a landlord of said premises nor engaged as landlord in the business of renting housing accommodations” (R. 16).

Based upon the Findings of Fact the Court made Conclusions of Law including the following:

“III.

“That Plaintiff’s prayer for restitution should be denied for the reason that the defendant is no longer a landlord engaged in the business of renting housing accommodations and that such relief would exercise no restraining purpose on the defendant or serve any other equitable purpose, and for the further reason that enforcement of such a judgment by a contempt proceedings would result in imprisonment for debt, thus making this Court an instrument of inequity and injustice.” (R. 17).

On the same date and based upon said Findings of Fact and Conclusions of Law the Court denied plaintiff's prayer for restitution and his prayer for injunction and dismissed the Complaint (R. 18).

SUMMARY

It was Appellee's principal contention in all of the several hearings before the District Court (1) that relief by way of restitution not having been specifically provided in the Housing and Rent Act of 1947, prayer for such relief was addressed to the general equitable jurisdiction of the Court; (2) that it was essential to establish some equitable grounds for invoking the plenary equitable powers of the Court; (3) that the District Court had authority to determine in its own discretion from the facts of this case whether or not the exercise of its equity powers was justified; (4) that where it affirmatively appeared that a decree of restitution could not serve as a restraining influence on the defendant against future violations of the Act or serve any other equitable purpose the Court had authority to deny this relief; (5) that the exercise of the Court's discretion in determining whether or not it should exercise its equity powers in a given case is not subject to review unless it appears that the District Court abused its discretion.

Appellee is making the same contention upon this appeal.

ARGUMENT

Appellant upon the several hearings in the Trial Court ignored the defendant's contention as outlined above and as argued to the Trial Court. It has not only carefully avoided them in its Brief upon this appeal but has mis-interpreted the record in its effort to do so. Appellant states (Brief p. 8):

“In the instant case the Trial Court denied restitution *for the sole reason* that to grant restitution would constitute imprisonment for debt (R. 13).” (Emphasis supplied.)

The Trial Court found as a fact that the defendant had not, since prior to the filing of the Complaint, been a landlord of the premises in question nor engaged as a landlord in the business of renting housing accommodations, and it concluded among other things, that restitution should not be granted under such circumstances because:

“such relief would exercise no restraining purpose on the defendant or serve any equitable purpose.” (R. 17.)

It is conceded that the District Court in a proper case has authority under the applicable provisions of the Housing and Rent Act of 1947 and the decision of the United States Supreme Court in the case of *Porter v. Warner Holding Company*, 328 U.S. 395, to grant restitution as a proper equitable remedy; that this remedy may be granted either with injunctive relief or by itself when circumstances justify it. The reason gen-

erally accepted by the Court for granting the relief of restitution appears in the following charactic statement in *Creedon v. Randolph*, 165 Fed. (2d) 918 (p. 919):

“That to require restitution of over-charges tends to enforce the law prohibiting them, no one can deny. That it operates to confer a benefit on the tenant . . . does not detract at all from the enforcement effect nor alter its nature. . . . (The administrator) asked for an order of restitution which, if granted, would be in its nature, a mandatory injunction.”

It has been held and it seems to be conceded in the instant case that where it appears from the facts that the danger of future violation by the defendant is non-existent injunctive relief may be denied. *Woods v. Boyle*, 77 Fed. Supp. 883. For precisely the same reason the Court may, when convinced from the facts of the case that no equitable purpose would thereby be served, refuse to grant relief in the form of restitution. As was stated in *Blood v. Fleming*, 161 Fed. (2d) 292 (295), the Act

“Confers broad equitable powers upon the Court giving it power to grant injunction, enter an order of restitution or any other equitable order conducive to proper enforcement of the Act.

“The limitations on the power of the Court to proceed under the provision of this section are governed by equitable principal.”

The requirement that some equitable need must be served in order to justify the granting of an order of restitution and that such an order is not to be granted in every case merely upon the showing of an over-charge

is recognized in *Porter v. Warner Holding Company* (Supra).

“It (order of restitution) may be considered as an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than a recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief. To be sure, such a recovery could not be obtained through an independent suit in equity if an adequate legal remedy were available.” (p. 399.)

In a later proceeding in this same case it was said:

“ . . . it was for the District Court in the exercise of its discretion to decide whether it should make an order of restitution” *Warner Holding Company v. Creedon*, 116 Fed. (2d) 119 (p. 122).

The District Court after hearing all of the evidence and the argument of counsel both upon conclusion of the trial and upon motion to reconsider, determined that no equitable purpose would be served by granting the plaintiff either an injunction or an order of restitution.

Appellant concedes (Brief p. 5) that the Court was justified in denying its prayer for an injunction. Clearly if the Court had authority to deny this relief which was specifically provided under the Act it would have authority to deny relief in the form of restitution when it found there was no equitable justification for it.

CONCLUSION

It is respectfully submitted that the Findings and Conclusions of the District Court were proper and that the decree based thereon should be affirmed.

MCDANNELL BROWN,
Attorney for Appellee.

No. 12519

United States
Court of Appeals
For the Ninth Circuit.

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellant,

vs.

ROSE SANFORD and EDNA FORGEY,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED

JUN 16 1950

PAUL F. O'BRIEN,
CLERK

No. 12519

United States
Court of Appeals
For the Ninth Circuit.

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellant,

vs.

ROSE SANFORD and EDNA FORGEY,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorney for Defendant.

In the District Court of the United States
For the District of Oregon

No. Civ. 4365

TIGHE E. WOODS, Housing Expediter, OFFICE
OF THE HOUSING EXPEDITER,

Plaintiff,

vs.

ROSE SANFORD and EDNA FORGEY,
Defendants.

COMPLAINT FOR INJUNCTION
AND RESTITUTION

Comes Now Plaintiff above named and alleges:

I.

That plaintiff is the duly appointed and qualified Housing Expediter, Office of the Housing Expediter, an agency of the United States government, created by the Veterans' Emergency Housing Act of 1946 as amended, (50 U.S.C.A. App. Sec. 1821 et seq.) and brings this action as such Housing Expediter pursuant to the Housing and Rent Act of 1947 (50 U.S.C.A. App. Sec. 1881-1902) as extended and amended by Public laws 422 and 464 of the 80th Congress, hereinafter referred to as the Act.

II.

That jurisdiction of this action is vested in the above-entitled Court under Sec. 206(b) of the Act.

III.

That at all times herein mentioned, Rose Sanford has been the landlord and operator of the controlled housing accommodation situated at 1825 S.W. 3rd Avenue, Portland, Oregon, within the Portland-Vancouver Defense-Rental Area; and that Edna Forgey is the Manager and agent of the said Rose Sanford, and manages said apartment as such.

IV.

That in the opinion of the Expediter, defendants have violated and are violating the provisions of the Housing and Rent Act of 1947, as amended, and the regulations issued pursuant thereto, in that they have demanded, received and collected, and are demanding, collecting and receiving from tenants occupying said accommodations, rentals in excess of the Maximum Legal Rentals fixed and established by law for such accommodations.

V.

That a detailed statement of said violations and overcharges showing the number of the apartment, name of the tenant, period of occupancy, maximum legal rent, the amount charged, and total overcharges as to each tenant are set forth in Exhibit "A" attached hereto, which said Exhibit "A" is by reference made a part of this paragraph and Complaint as fully as though set forth in detail herein.

Wherefore Plaintiff prays:

1. For a temporary and permanent injunction, restraining and enjoining the defendant, Rose San-

ford, her agents, employees, servants and associates, or anyone acting for or on her behalf, from demanding, collecting, receiving or retaining rentals for any of the housing accommodations situated at 1825 S.W. 3rd Avenue, Portland, Oregon, in excess of the Maximum Legal Rentals fixed and established by law; or from otherwise or in any manner violating the provisions of the Housing and Rent Act of 1947, as amended, and the regulations issued pursuant thereto.

2. For an Order of Restitution, requiring and directing the defendant, Rose Sanford, to refund and repay to each of the tenants named, the total amount set forth opposite each name in Exhibit "A" of this Complaint.

3. Plaintiff further prays for his costs and disbursements herein.

Dated at Seattle, Washington, this 9th day of February, 1949.

/s/ C. E. KNOWLTON, JR.,

/s/ ROY C. FOX,

Attorneys for Plaintiff.

/s/ FLOYD W. HAMILTON,

Assistant U. S. Attorney.

/s/ N. RAY ALBER.

EXHIBIT "A"

Landlord: Rose Sanford			Premises: 1825 S.W. 3rd Avenue, Portland, Oregon			
Apt. No.	Tenant	Period of Occupancy	Amt. Chgd.	MLR	O.C.	Total O.C.
			(Per Mo.)	(Per Mo.)		
1	Mrs. Tillie Garrison	12/ 4/48 to 2/ 3/49 (2)	\$40.00	\$27.50	\$12.50	\$25.00
2	Orie Couture	12/12/48 to 12/27/48 (1½)	45.00	35.00	10.00	5.00
9	Orie Couture	12/27/48 to 1/10/49 (½)	45.00	40.00	5.00	2.50
3	LaVerne M. Hoyt	12/31/48 to 1/31/49 (1)	35.00	30.00	5.00	5.00
		1/ 4/49 cleaning deposit paid				5.00
8	Eugene Kilgore	3/ 4/48 to 2/ 4/49 (11)	40.00	27.50	12.50	137.50
		3/ 5/48 paid cleaning deposit				5.00
9	Frank S. Callopy	9/ 7/47 to 10/ 6/48 (13)	50.00	40.00	10.00	130.00
12	Mrs. Eve Palmer	2/ 1/48 to 1/31/49 (12)	30.00	20.00	10.00	120.00
Total						\$435.00

[Endorsed]: Filed Feb. 10, 1949.

[Title of District Court and Cause.]

ANSWER

Comes now the defendants herein and in answer to the plaintiff's complaint in the cause, admit, deny and allege as follows:

I.

That defendants have no knowledge sufficient to form a belief as to the truth of paragraph I of plaintiff's complaint so therefore defendants deny the said allegation and the whole thereof.

II.

Defendants admit paragraph II of Plaintiff's complaint.

III.

Defendants admit paragraph III of Plaintiff's complaint.

IV.

Defendants deny paragraphs IV and V of Plaintiff's complaint and each and every part and the whole thereof.

Wherefore, defendants having fully answered the plaintiff's complaint, pray that the same be dismissed and that defendants have judgment and decree for their costs and disbursements incurred herein.

/s/ LEROY L. LOMAX,

Attorney for Defendants.

Duly verified.

Receipt of Copy Acknowledged.

[Endorsed]: Filed Mar. 2, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter was first heard by the Court sitting without a jury on May 16, 1949, on plaintiff's motion for summary judgment, Roy C. Fox, attorney of record appearing for plaintiff, and defendants appearing by their attorney, Leroy L. Lomax, and after hearing the arguments of counsel, the Court reserved decision on said motion and the case was set for trial May 24, 1949, at which date and time plaintiff appeared by his attorney, Roy C. Fox, defendants appearing in person and by their attorney, Leroy L. Lomax and the testimony of witnesses and documentary evidence having been introduced, the Court again reserved its decision.

That thereafter on June 13, 1949, the Court made an Order that an injunction will issue and restitution be denied for the reasons stated in Civil Action No. 4366, Woods vs. Brown; that thereafter on or about the 29th day of July, 1949, plaintiff filed a motion to reconsider said opinion and order which said motion was denied by oral order of the Court on November 25, 1949.

The Court having considered all preliminary matters and the testimony adduced on the trial of said action on May 24, 1949, and being fully advised in the premises, now makes the following

Findings of Fact

I.

That plaintiff is the duly appointed and qualified Housing Expediter of the Office of the Housing Expediter, an agency of the United States Government created by the Veterans Emergency Housing Act of 1946 as amended and brings this action pursuant to the Housing and Rent Act of 1947 as amended.

II.

That jurisdiction of this action is conferred upon this Court by Section 206(b) of the Act.

III.

That from and including the 7th day of September, 1947, to the 31st day of January, 1949, the defendant, Rose Sanford, has been the landlord and operator of the certain controlled housing accommodation situated at 1825 S.W. 3rd Avenue, Portland, Oregon, within the Portland-Vancouver Defense-Rental Area, and that Edna Forgey was, during all of said period, the manager and agent of the said Rose Sanford and managed and operated said apartment as such.

IV.

That Frank S. Callopy occupied Apt. 9 of the accommodations situated at 1825 S.W. 3rd Avenue, Portland, Oregon, as a tenant from the 7th day of September, 1947, to the 6th day of October, 1948; that during each and every month of said period, the defendants collected and received from the said

tenant for the use and occupancy of said accommodation, rentals in the amount of \$50.00 per month; that the Maximum Legal Rent established for said accommodation during all of said period was the sum of \$40.00 per month, constituting an overcharge to said tenant in the amount of \$10.00 per month for a total overcharge for the period in the amount of \$130.00.

V.

That Apt. 12 of the above-described accommodations was occupied by Mrs. Eva Palmer as a tenant from the 1st day of February, 1948, to the 31st day of January, 1949; that during each and every month of said period, the defendants collected and received from said tenant for the use and occupancy of said accommodation, rentals in the amount of \$30.00 per month; that the Maximum Legal Rent established by law for said accommodation was the sum of \$20.00 per month, constituting an overcharge of \$10.00 per month for a total overcharge of \$120.00.

VI.

That plaintiff submitted no testimony as to overcharges of any other tenants alleged in the Complaint, from which Findings of Fact, the Court makes the following

Conclusions of Law

I.

That plaintiff's prayer for an Order of Restitution be denied for the reason that the granting of

restitution would constitute imprisonment for debt.

II.

That plaintiff is entitled to a permanent injunction restraining the defendants and each of them from collecting, demanding or receiving, rentals in excess of the Maximum Legal Rentals established by law for Apts. 9 and 12 in the premises situated at 1825 S.W. 3rd Avenue, Portland, Oregon.

Done In Open Court this 18th day of February, 1950.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

Presented by:

/s/ ROY C. FOX,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 18, 1950.

In the District Court of the United States
for the District of Oregon

No. 4365

TIGHE E. WOODS, Housing Expediter, OFFICE
OF THE HOUSING EXPEDITER,

Plaintiff,

vs.

ROSE SANFORD and EDNA FORGEY,

Defendants.

JUDGMENT

This matter was tried before the Court without a jury on the 24th day of May, 1949, plaintiff appearing by his attorney of record, Roy C. Fox, defendants appearing in person and by their attorney, Leroy L. Lomax, and the testimony of witness and documentary evidence having been received, and the Court having made and entered herein its Findings of Fact and Conclusions of Law, and being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that plaintiff's prayer for restitution be and is hereby denied.

It Is Further Ordered that the defendants, Rose Sanford and Edna Forgey, and each of them be and are hereby permanently enjoined and restrained from demanding, collecting or receiving from tenants occupying Apts. 9 and 12 of the accommodations situated at 1825 S.W. 3rd Avenue, Portland, Oregon, rentals in excess of the Maximum Legal

Rentals established by law for such accommodations.

It Is Further Ordered that no costs be assessed.

Done In Open Court this 18th day of February,
1950.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

Presented by:

/s/ ROY C. FOX,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 18, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Tighe E. Woods, Housing Expediter, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on the 18th day of February, 1950.

/s/ ROY C. FOX,
Attorney for Plaintiff.

Service accepted.

[Endorsed]: Filed Mar. 29, 1950.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Appellant designates the following portions of the record and proceedings to be contained in the record on appeal in this action:

- (1) Complaint.
- (2) Defendants' Answer to Complaint.
- (3) Memorandum of Decision June 13th, 1949.
- (4) Findings of Fact and Conclusions of Law prepared by plaintiff, filed February 18, 1950.
- (5) Judgment.
- (6) Notice of Appeal.
- (7) Statement of Points on Which Appellant intends to Rely.
- (8) Memorandum of decision in the case of Woods v. Brown, Civil Action No. 4366.
- (9) This Designation.

/s/ ROY C. FOX,

Attorney for Plaintiff.

Service accepted.

[Endorsed]: Filed Mar. 29, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

The point upon which appellant intends to rely on this appeal is as follows:

(1) The Court erred in denying plaintiff's prayer for restitution of rental overcharges in the above-entitled case.

/s/ ROY C. FOX,
Attorney for Plaintiff.

Service accepted.

[Endorsed]: Filed Mar. 29, 1950.

In the District Court of the United States
for the District of Oregon

Civil No. 4366

TIGHE E. WOODS, Housing Expediter, OFFICE
OF THE HOUSING EXPEDITER,
Plaintiff,

vs.

JOHN S. BROWN,

Defendant.

MEMORANDUM OF DECISION

This case prays for "restitution" of \$70.20 to one tenant, \$212.30 to another, and for an injunction.

At the argument I asked able counsel for the Expediter a question that has been in my mind for

some time. I asked him how the Expediter intended to enforce orders for "restitution," whether by execution, as on the usual money judgment, or by invoking the court's contempt power. He answered the latter. Since I consider this would be imprisonment for debt, which I abhor, the order for restitution is denied.

The defendant has sold the premises, so an injunction to control defendant's future conduct is not needed. Some time ago I denied an injunction for the same reason in a Wages and Hours case. There the defendant had sold his sawmill. And see a decision in one of the recent advance sheets by Honorable John E. Miller, one of the United States District Judges for Arkansas.

Judgment for defendant for the reasons stated.

Dated June 15, 1949.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint for injunction and restitution, Answer, Findings of fact and conclusions of law, Judgment, Notice of appeal, Designation of record on appeal,

Statement of points on which appellant intends to rely, Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 4365, in which Tighe E. Woods, Housing Expediter, is plaintiff and appellant and Rose Sanford and Edna Forgey are defendants and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 7th day of April, 1950.

LOWELL MUNDORFF,
Clerk.

[Seal] By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 12519. United States Court of Appeals for the Ninth Circuit. Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, Appellant, vs. Rose Sanford and Edna Forgey, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed April 10, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 12519

**In the United States Court of Appeals
for the Ninth Circuit**

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT**

v.

ROSE SANFORD AND EDNA FORGEY, APPELLEES

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON**

BRIEF FOR APPELLANT

ED DUPREE,

General Counsel,

LEON J. LIBEU,

Assistant General Counsel,

LOUISE F. MCCARTHY,

Special Litigation Attorney,

Office of the Housing Expediter, Washington 25, D. C.

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12519

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT

v.

ROSE SANFORD AND EDNA FORGEY, APPELLEES

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON*

BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION

Plaintiff appeals from a final judgment which granted injunctive relief but denied restitution of rent overcharges to tenants in an action brought pursuant to Section 206 of the Housing and Rent Act of 1947, as amended (50 U. S. C. App. 1881 et seq.) (R. 11). The Complaint was filed February 10, 1949 (R. 5). Defendants answered on March 2, 1949 (R. 6). Plaintiff served a Request for Admissions on defendants on March 10, 1949. On April 25, 1949, plaintiff moved for summary judgment. Thereafter, defendants answered the Request for Admissions.

Plaintiff's Motion for summary judgment was denied and the case was tried on the merits on May 24, 1949 (R. 7). Judgment was entered on February 18, 1950, together with Findings of Fact and Conclusions of Law (R. 7). Notice of Appeal was filed on March 28, 1950 (R. 12). Jurisdiction of the District Court is conferred by Section 206 of the Housing and Rent Act of 1947. Jurisdiction of this Court is conferred by Section 1291 of the Judicial Code (28 U. S. C. 1291).

STATEMENT OF THE CASE

Tighe E. Woods, Housing Expediter, plaintiff below, appeals from a final judgment of the United States District Court for the District of Oregon (R. 11) entered on February 18, 1950, which judgment denied plaintiff's prayer for restitution to tenants of amounts collected as rent overcharges while granting an injunction against future violations of the Housing and Rent Act of 1947, as amended.

The Complaint which was filed on February 10, 1949 (R. 2) alleged that defendant, Rose Sanford, was the landlord of controlled housing accommodations located at 1825 S. W. 3d Avenue, Portland, Oregon, in the Portland-Vancouver Defense Rental Area (R. 3); that defendant, Edna Forgey, is the Manager of said housing accommodations and the agent of defendant Sanford (R. 3); that defendants had violated the provisions of the Housing and Rent Act of 1947, as amended, and the regulations issued pursuant thereto by collecting rents in excess of the maximum legal rentals for six of the dwelling units located in said housing accommodations (R. 3). Plaintiff prayed for

restitution of overcharges to the tenants in the amount of \$435 and for an injunction against future violations (R. 3).

After trial on May 24, 1949 the Trial Court found as facts that defendant, Rose Sanford, was the landlord and operator of the controlled housing accommodations (R. 8); that defendant, Edna Forgey managed and directed said accommodations (R. 8); that defendants collected and received from Frank S. Callopy overcharges in the amount of \$130 for occupancy of Apartment 9 (R. 9); that defendants collected and received from Mrs. Eva Palmer overcharges in the amount of \$120 for occupancy of Apartment 12 (R. 9); and that there had been no testimony as to any other overcharges (R. 9).

As Conclusions of Law, the Court held that plaintiff was entitled to a permanent injunction restraining the defendants and each of them from collecting, demanding or receiving, rentals in excess of the maximum legal rentals established by law for Apartments 9 and 12 in the premises situated at 1825 S. W. 3d Avenue, Portland, Oregon (R. 10); and that plaintiff's prayer for an order of restitution should be denied for the reason that the granting of restitution would constitute imprisonment for debt (R. 9). Judgment was entered on February 18, 1950 (R. 11). Plaintiff appeals from that part of the judgment which denied restitution to the tenants since it was based solely on the conclusion of law that the granting of such restitution would constitute imprisonment for debt (R. 12).

SPECIFICATIONS OF ERROR**I**

The District Court erred in holding that the granting of restitution would constitute imprisonment for debt.

II

The District Court erred in denying an order granting restitution of rental overcharges because in so doing it deprived the Housing Expediter of a remedy to which he was entitled and allowed defendants to retain the money by which they had been unjustly enriched.

III

The District Court erred in denying restitution.

SUMMARY

Appellant contends that the trial court should be reversed because it was in error in concluding as a matter of law that the granting of an order of restitution would constitute imprisonment for debt. There is no danger of imprisonment for failure to obey an order of restitution through inability to perform. Financial inability is a valid defense to an order of restitution of money. The Court should have vindicated the public interest under an emergency statute by granting restitution when it was sought by a public official as an aid to enforcement of the federal law. The issuance of an order of restitution would place on defendants the burden of proving their inability to pay which is proper. But if they established such inability there would be no imprisonment. Accord-

ingly, the Court erred as a matter of law in denying relief on the ground that granting an order of restitution would constitute imprisonment for debt.

ARGUMENT

Appellant, plaintiff below, alleges as error only the refusal by the Trial Court to grant restitution of rental overcharges to the two tenants who occupied the housing accommodations owned by defendant, Rose Sanford, as to whom overcharges were proved, on the ground that the granting of restitution would constitute imprisonment for debt (R. 9).

Appellant, therefore, presents the following argument.

The district court erred in concluding as a matter of law that the granting of restitution would constitute imprisonment for debt

The contention that an order of restitution would constitute imprisonment for debt cannot be sustained. It has been recently rejected by the Courts of Appeals for the Sixth and Eighth Circuits. In the Sixth Circuit the question arose in the case of *Woods v. Budd*, 179 F. 2d 244, in which the Trial Court denied an order of restitution of rental overcharges where the defendant had defaulted and the Housing Expediter failed to show her inability to pay. The Court of Appeals reversed the Court below without opinion other than instructions to enter an order of restitution against defendant. It has followed the same procedure in a group of five later cases similarly disposed of by the same trial judge (see *Woods v. Edgell*, No. 11018; *Woods v. Ferguson*, No. 11019;

Woods v. Palicka, No. 11020; *Woods v. Owsley*, No. 11021; and *Woods v. Koogle*, 180 F. 2d 1022, in the United States Court of Appeals for the Sixth Circuit).

The sole question in those cases was of whether or not defendants would be imprisoned for debt. It was fully discussed in the Housing Expediter's brief and on the argument. The same principle was clearly stated in the second Warner Holding Company case, *Warner Holding Company v. Creedon*, 166 F. 2d 119 (C. A. 8). The Supreme Court had determined in the case of *Porter v. Warner Holding Company*, 328 U. S. 395, that restitution was a proper equitable remedy. The case was then remanded to the District Court which ordered defendants to make restitution of the rental overcharges to the tenants. The defendants on a further appeal contended that they were unable to comply with the court's order and would, therefore, be imprisoned for debt contrary to the Constitution of the United States. The Court of Appeals for the Eighth Circuit rejected this contention stating (at p. 122):

Nor does it appear from anything in the record that the defendant's officers are presently or that they will be at any time in the future threatened with an unconstitutional imprisonment. They are in no danger of punishment by imprisonment for failure to perform the order of restitution where performance is impossible, and where they in good faith make a reasonable effort to comply with the court's order. *Chapman v. United States*, 8 Cir., 139 F. 2d 327, 331; *McGarry v. Securities and Ex-*

change Commission, 10 Cir., 147 F. 2d 389, 392, 393; *Hugen v. Porter*, 9 Cir., 156 F. 2d 362, 366; *Cooper v. Dasher*, *supra*, 290 U. S., page 110, 54 S. Ct. page 7, 78 L. Ed. 203.

The case of *Chapman v. United States*, 139 F. 2d 327, 331 (C. A. 8), cited above contains the following statement to the same effect.

Concerning appellant's final contention that the judgment of the District Court ordering him to pay the amount found by the court to be owing by him to the market administrator for the producer-settlement fund is void, because exposing the appellant to imprisonment for debt in violation of the statute of the United States (28 U. S. C. A. § 843), and contrary to Article 2, Section 16, of the Constitution of the State of Missouri, Mo. R. S. A., it is sufficient to say that there is nothing in the record to indicate that appellant is unable to pay the judgment against him, or even that he is unwilling to pay it if the judgment of the court below is in accordance with the law. Specific enforcement of the marketing orders is authorized by the Marketing Agreement Act, 7 U. S. C. A. § 608a (6), and mandatory injunctions requiring handlers to make payments of amounts due from them under marketing orders of the Secretary have received approval by the courts of the United States. *United States v. Rock Royal Co-Op., Inc., et al.*, and other cases cited *supra*. The appellant has not been imprisoned, nor threatened with imprisonment, and, if his contention is well founded, we may not suppose that the District Court will attempt to enforce its judgment by unlawful

or unconstitutional means. It will be time enough for the appellant to raise this point when the unlikely contingency occurs or is threatened.

In the instant case the Trial Court denied restitution for the sole reason that to grant restitution would constitute imprisonment for debt (R. 13). If the restitution order is granted, defendants, if able to pay, will be compelled to do so or suffer the penalty attached to contempt of court. But if unable to pay, they will not be imprisoned for debt since inability to pay is a valid defense to a contempt proceeding (Cf. *Maggio v. Zeitz*, 333 U. S. 56). This is the type of case where the defendants have the keys to the jail in their own pockets.

If the defendants are not financially able to make restitution they will lose nothing by the entry of an order directing them to make restitution. It is only when they fail to obey the order that plaintiff will be entitled to apply for a rule requiring them to show cause why they should not be held in civil contempt.

E. Ingraham Co. v. Germanow et al., 4 F. 2d 1002 (C. A. 2).

Coca-Cola Co. v. Feulner, 7 F. Supp. 364 (S. D. Tex.).

The Supreme Court has held that restitution of rental overcharges is an equitable remedy which may be employed by the courts of the United States in bringing about compliance with emergency legislation affecting the economy of the Nation. In *Porter v. Warner Holding Co.*, *supra*, p. 402, the Supreme Court said:

* * * When the administrator seeks restitution under § 205 (a), he does not request the court to award statutory damages to the purchaser or tenant or to pay to such person part of the penalties which go to the United States Treasury in a suit by the Administrator under § 205 (e). Rather he asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant. Such action is within the recognized power and within the highest tradition of a court of equity. Thus it is plainly unaffected by the provision of § 205 (e).

The order of the Trial Court in this case not only disregarded the public interest but in the face of the Supreme Court's holding on the propriety of an order of restitution condemned it in effect as an unconstitutional exercise of power.

Accordingly, the Court below was clearly in error in denying restitution upon the ground that to grant it would constitute unlawful imprisonment for debt. The premise being false, the ruling based thereon must likewise fall unless there are other reasons assigned for the conclusion reached. Since there are no other grounds stated, the judgment below must be reversed with instructions to grant the relief prayed for in the Complaint.

CONCLUSION

It is respectfully submitted that the judgment should be reversed and the case remanded to the Court below with instructions to grant the order of restitution as prayed for in the Complaint.

Respectfully submitted.

ED DUPREE,

General Counsel,

LEON J. LIBEU,

Assistant General Counsel,

LOUISE F. MCCARTHY,

Special Litigation Attorney,

Office of the Housing Expediter, Washington 25, D. C.

No. 12520

United States
Court of Appeals
for the Ninth Circuit.

FLO PARKER and ELGIN R. PARKER,
Appellants,
VS.

HARRY C. WESTOVER, Individually and as
Collector of Internal Revenue for the Sixth
District of California,
Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED

APR 30 1950

PAUL P. O'BRIEN, CLERK

No. 12520

United States
Court of Appeals
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FLO PARKER and ELGIN R. PARKER,
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Appeal from the United States District Court,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Southern District of California, Central Division

No. 8604-B

FLO PARKER,

Plaintiff,

vs.

HARRY C. WESTOVER, Individually and as
Collector of Internal Revenue for the 6th District of California,

Defendant.

COMPLAINT

(Refund for Overpayment of Tax.)

The complaint of the plaintiff respectfully shows to this Court and alleges as follows:

I.

That at all times herein mentioned the plaintiff was, and now is, an individual residing at 120 South Burris, Compton, California.

II.

The defendant, during all the times mentioned herein was, and now is, the duly appointed and acting Collector of Internal Revenue for the 6th District of California, with his offices at Los Angeles, California.

III.

That on or about the 15th day of March, 1945, the plaintiff duly filed with the Collector of Internal Revenue for the 6th District of California her federal income tax return for the year 1944 in accordance with the Internal Revenue Code of the United States then in effect and paid to the defendant the amounts shown below, which plaintiff believes to be the entire amount for which she was liable for income tax for the year 1944:

April 13, 1944	\$ 6,875.00
June 9, 1944	6,875.00
September 12, 1944	6,875.00
January 12, 1945	20,651.65
	<hr/>
	\$41,276.65

IV.

On or about July 9, 1947, the plaintiff received from the defendant as Collector of Internal Revenue, as aforesaid, a notice and demand for payment of an additional tax of \$55,562.19, plus interest of \$7,665.30, claimed to be due from plaintiff for her 1944 income tax.

V.

Plaintiff paid to the Collector of Internal Revenue for the 6th District of California said deficiency and interest as follows:

<u>Date</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
July 12, 1947	\$27,590.01	\$3,749.20	\$31,339.21
October 8, 1947	27,972.18	4,166.32	32,138.50
	<hr/>	<hr/>	<hr/>
Totals.....	\$55,562.19	\$7,915.52	\$63,477.71

VI.

On January 23, 1948, within the statutory time therefor, plaintiff filed with the defendant, Collector of Internal Revenue for the 6th District of California, her claim for refund of 1944 federal income tax in the amount of \$55,562.19, and interest paid thereon. The ground for her claim was the same as will be hereinafter set forth in this complaint.

VII.

Neither the defendant nor the Commissioner of Internal Revenue has audited plaintiff's claim although it has been on file for more than six months.

VIII.

Plaintiff brings this action under the provisions of Section 3772 of the Internal Revenue Code.

IX.

The deficiency of \$55,562.19 was due to the erroneous inclusion by the defendant and the Commissioner of Internal Revenue in plaintiff's 1944 gross income of \$64,132.73, being one-quarter of the net income of a partnership known as Southern Heater Company. Plaintiff did not own the quarter interest in said partnership and was not taxable on the quarter interest in said partnership income but the defendant and the Commissioner of Internal Revenue erroneously included such income in plaintiff's taxable income.

X.

As of October 31, 1943, plaintiff owned a half interest in a partnership known as Southern Heater Company. Plaintiff's husband, E. R. Parker, owned the other half interest. On October 31, 1943, plaintiff gave to each of her four children a six and one-fourth per cent ($6\frac{1}{4}\%$) interest in the net assets, including good will, of the Southern Heater Company and on the same date her husband, E. R. Parker, gave a six and one-fourth per cent ($6\frac{1}{4}\%$) interest in said net assets to each of their four children. Said transfers and gifts were absolute and complete and without any conditions.

XI.

Plaintiff and her husband, E. R. Parker, filed federal and state gift tax returns in which each showed that the value given to her four children totaled \$49,492.45. Plaintiff paid to the defendant on such gifts, federal gift tax in the amount of \$243.35.

XII.

Subsequently the Commissioner of Internal Revenue determined that the transfers were complete and irrevocable and constituted taxable gifts and determined that the value of the gifts made by plaintiff to her four children aggregated \$106,250.00 and demanded additional gift taxes of \$7,774.15 from plaintiff. In arriving at the above values for gift tax purposes the Commissioner of Internal

Revenue used a salary of \$12,000.00 per year for E. R. Parker in computing the past earnings and estimating the future earnings of the business, and in determining the value of the good will of the business.

Plaintiff paid to the defendant the federal gift taxes as demanded, together with interest thereon.

XIII.

As a consequence of the transfers made by plaintiff and E. R. Parker to their four children, plaintiff owned a 25% interest in said assets and business, her husband owned a 25% interest in said assets and business, and her four children owned the other 50% in such assets and business. All six of them were tenants in common and it was necessary to have some formal organization through which the business could be carried on. Accordingly, E. R. Parker, the father of the children, filed in the Superior Court of the State of California in and for the County of Orange, in which County the parties were then living, a petition for appointment of guardian. In this proceeding, Docket No. A-11392, the Superior Court appointed Elgin R. Parker, the father, as guardian, provided he filed four corporate surety bonds of \$23,000.00 each. Such surety bonds were promised on condition that the proposed guardian obtain an order of the Court instructing the guardian to enter into a partnership agreement with the other owners of the business and instructing the guardian to keep the property of the wards

invested in the partnership interests and instructing the guardian, as partner, to retain in the partnership some of the profits of the business. Such Court authorizations were obtained and Letters of Guardianship to Elgin R. Parker were thereupon issued.

XIV.

Elgin R. Parker, individually and as the guardian, and plaintiff signed the articles of co-partnership to take effect as of November 1, 1943.

Each partner in the partnership of Southern Heater Company had an equal voice in the management of the business. Hence, the Superior Court, which appointed the guardian of the four guardianship estates, had four votes against one for plaintiff and one for plaintiff's husband and the Court had control and management of the partnership business through the instrumentality of the guardian. Since November 1, 1943, the guardian has filed annual accounts with the Court and has had the Court's approval thereon and has operated and managed the guardianship estates under the supervision and jurisdiction and under the orders of the Probate Court.

XV.

The partnership filed a certificate of fictitious firm name as required by California law and complied with other legal formalities. It has kept separate books of account, in which each partner's share of capital and income is credited to him.

XVI.

Plaintiff and her husband have continued to support their four children and none of the income of the children has been used for their support or that of the parents.

XVII.

The 1943 gifts by plaintiff and her husband to their four children of interests in the assets of the business, mentioned above, were completely valid and binding and vested in each child a $\frac{1}{8}$ interest in the assets of the business of Southern Heater Company. Said gifts are irrevocable and the income from said assets and interests of the children is not the income of plaintiff or her husband. Capital was a material income producing factor in the business of Southern Heater Company and the income from the children's portion of this capital was their own income and not the income of the parents. A salary equal to the value of the services rendered by Elgin R. Parker to the partnership has been paid and deducted before computing the distributable shares of the income of the partners.

XVIII.

Plaintiff's children were partners with plaintiff and her husband in the business known as Southern Heater Company and each partner, including the children, is taxable on his or her distributive share of the partnership income and plaintiff is not tax-

able on any of the distributable shares of the partnership income which belong to her four children.

XIX.

Plaintiff's total tax liability on her own income for the calendar year 1944 is \$40,389.25. Plaintiff has, upon the demand of the defendant, paid the defendant \$96,838.84 and has overpaid her 1944 income tax in the amount of \$56,449.59. Neither said amount nor any part thereof has been repaid to plaintiff. Plaintiff is the owner of said claim.

XX.

That by reason of the premises defendant became, and is, indebted to the plaintiff in the sum of \$56,449.59, plus interest of \$7,028.12 paid thereon, plus interest of 6% per annum on \$31,339.21 from July 12, 1947, until repaid to plaintiff, and plus interest on \$32,138.50 from October 8, 1947, until repaid to plaintiff, plus costs of this suit, together with such other relief as seems proper to the Court.

/s/ MELVIN D. WILSON,

/s/ JOSEPH D. PEELER,

Attorneys for Plaintiff.

State of California,
County of Los Angeles—ss.

Flo Parker, being duly sworn, deposes and says that she is the plaintiff in the foregoing Complaint;

that she has read the Complaint and knows the contents thereof; and that the statements contained therein are true of her own knowledge.

/s/ FLO PARKER.

Subscribed and Sworn to before me this 23rd day of August, 1948.

[Seal]: /s/ E. L. EVENSIZER,
Notary Public in and for said County and State.

My Commission Expires Nov. 6, 1950.

[Endorsed]: Filed September 1, 1948.

[Title of District Court and Cause.]

ANSWER

Comes now Harry C. Westover, individually and as Collector of Internal Revenue for the Sixth District of California, and in answer to plaintiff's complaint herein admits, denies, and alleges as follows:

I.

Admits the allegations contained in paragraph I of the complaint.

II.

Admits the allegations contained in paragraph II of the complaint.

III.

Answering paragraph III, defendant admits the allegations except that he denies that the amounts of taxes set out in said paragraph constituted plaintiff's entire tax liability for 1944.

IV.

Admits the allegations contained in paragraph IV of the complaint.

V.

Answering paragraph V, defendant admits the allegations thereof except that it is alleged that the item of \$31,339.21 was paid on July 14, 1947, and the item of \$32,138.50 was paid on September 26, 1947. instead of the dates alleged.

VI.

Answering paragraph VI, defendant admits the filing of a claim for refund on or about the date alleged, but denies the correctness, validity and legal effectiveness of each and every allegation therein, and denies that the allegations set forth in said claim are sufficient to constitute a legal and valid claim for refund.

VII.

Answering paragraph VII, defendant admits that the Commissioner of Internal Revenue has not rendered a decision on said claim prior to the insti-

tution of this sut, but denies the remaining allegations in said paragraph.

VIII.

Admits the allegations contained in paragraph VIII of the complaint.

IX.

Denies each and every allegation contained in paragraph IX thereof.

X.

Denies each and every allegation contained in paragraph X thereof.

XI.

Admits the allegations contained in paragraph XI of the complaint.

XII.

Admits the allegations contained in paragraph XII of the complaint.

XIII.

Answering paragraph XIII, defendant admits that E. R. Parker filed a petition for appointment

of a guardian as alleged; that said Parker was appointed guardian and his bonds fixed in the amounts as alleged; that the court issued orders instructing the guardian to enter into an agreement as alleged and entered the authorizations and issued the letters of guardianship as alleged. Defendant denies the remaining allegations in paragraph XIII.

XIV.

Answering paragraph XIV, defendant admits that Elgin R. Parker, individually and as guardian, together with this plaintiff, signed the articles of copartnership as alleged. The remaining allegations are denied.

XV.

Answering paragraph XV, defendant alleges that he does not have sufficient knowledge or information upon which to form a belief as to the truth of the allegations therein contained.

XVI.

Answering paragraph XVI, defendant alleges that he does not have sufficient knowledge or information upon which to form a belief as to the truth of the allegations therein contained.

XVII.

Denies each and every allegation contained in paragraph XVII thereof.

XVIII.

Denies each and every allegation contained in paragraph XVIII thereof.

XIX.

In answer to paragraph XIX, defendant admits that plaintiff has paid the amount therein alleged; that no part of said amount has been repaid to said plaintiff; and that plaintiff is the owner of said claim. Defendant denies all of the other allegations in said paragraph contained.

XX.

Denies each and every allegation contained in paragraph XX thereof.

Wherefore, defendant having fully answered the complaint prays that the complaint be dismissed with costs, and for all just and proper relief.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL,
Assistant United States
Attorney.

EUGENE HARPOLE,
Special Attorney. Bureau of
Internal Revenue.

By /s/ E. H. MITCHELL,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 8, 1949.

In the District Court of the United States for the
Southern District of California, Central Di-
vision

No. 8605 B

ELGIN R. PARKER,

Plaintiff,

vs.

HARRY C. WESTOVER, Individually and as
Collector of Internal Revenue for the Sixth
District of California,

Defendant.

No. 8604 B

FLO PARKER,

Plaintiff,

vs.

HARRY C. WESTOVER, Individually and as
Collector of Internal Revenue for the Sixth
District of California,

Defendant.

DEMAND FOR TRIAL BY JURY

To Harry C. Westover, Defendant, and James M.
Carter, United States Attorney, E. H. Mitchell,
Assistant United States Attorney; Eugene Har-
pole, Special Attorney, Bureau of Internal
Revenue, Attorneys for Defendant:

You Are Hereby Notified That Trial by Jury is

demand by Elgin R. Parker and Flo Parker,
Plaintiffs in the above-entitled causes.

/s/ MELVIN D. WILSON,
Counsel for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed February 16, 1949.

In the District Court of the United States for the
Southern District of California, Central Di-
vision

No. 8605-B

ELGIN R. PARKER,

Plaintiff,

vs.

HARRY C. WESTOVER, Individually and as
Collector of Internal Revenue for the 6th Dis-
trict of California,

Defendant.

COMPLAINT

(Refund for Overpayment of Tax.)

The complaint of the plaintiff respectfully shows
to this Court and alleges as follows:

I.

That at all times herein mentioned the plaintiff

was, and now is, an individual residing at 120 South Burris, Compton, California.

II.

The defendant, during all the times mentioned herein was, and now is, the duly appointed and acting Collector of Internal Revenue for the 6th District of California, with his offices at Los Angeles, California.

III.

That on or about the 15th day of March, 1945, the plaintiff duly filed with the Collector of Internal Revenue for the 6th District of California his federal income tax return for the year 1944 in accordance with the Internal Revenue Code of the United States then in effect and paid to the defendant the amounts shown below, which plaintiff believes to be the entire amount for which he was liable for income tax for the year 1944:

April 13, 1944	\$ 6,875.00
June 9, 1944	6,875.00
September 12, 1944	6,875.00
January 12, 1945	20,839.15
	<hr/>
	\$41,464.15

IV.

On or about July 9, 1947, the plaintiff received from the defendant as Collector of Internal Revenue, as aforesaid, a notice and demand for payment of an additional tax of \$55,589.70, plus in-

terest of \$7,669.19, claimed to be due from plaintiff for his 1944 income tax.

V.

Plaintiff paid to the Collector of Internal Revenue for the 6th District of California said deficiency and interest as follows:

<u>Date</u>	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
July 12, 1947	\$27,617.52	\$3,752.99	\$31,370.51
October 8, 1947	27,972.18	4,166.32	32,138.50
Totals.....	\$55,589.70	\$7,919.31	\$63,509.01

VI.

On January 23, 1948, within the statutory time therefor, plaintiff filed with the defendant, Collector of Internal Revenue for the 6th District of California, his claim for refund of 1944 federal income tax in the amount of \$55,589.70, and interest paid thereon. The ground for his claim was the same as will be hereinafter set forth in this complaint.

VII.

Neither the defendant nor the Commissioner of Internal Revenue has audited plaintiff's claim although it has been on file for more than six months.

VIII.

Plaintiff brings this action under the provisions of Section 3772 of the Internal Revenue Code.

IX.

The deficiency of \$55,589.70 was due to the erroneous inclusion by the defendant and the Commissioner of Internal Revenue in plaintiff's 1944 gross income of \$64,132.74, being one-quarter of the net income of a partnership known as Southern Heater Company. Plaintiff did not own the quarter interest in said partnership and was not taxable on the quarter interest in said partnership income but the defendant and the Commissioner of Internal Revenue erroneously included such income in plaintiff's taxable income.

X.

As of October 31, 1943, plaintiff owned a half interest in a partnership known as Southern Heater Company. Plaintiff's wife, Flo Parker, owned the other half interest. On October 31, 1943, plaintiff gave to each of his four children a six and one-fourth per cent ($6\frac{1}{4}\%$) interest in the net assets, including good will, of the Southern Heater Company and on the same date his wife, Flo Parker, gave a six and one-fourth per cent ($6\frac{1}{4}\%$) interest in said net assets to each of their four children. Said transfers and gifts were absolute and complete and without any conditions.

XI.

Plaintiff and his wife, Flo Parker, filed federal and state gift tax returns in which each showed

that the value given to his four children totaled \$49,492.45. Plaintiff paid to the defendant on such gifts, federal gift tax in the amount of \$243.35.

XII.

Subsequently the Commissioner of Internal Revenue determined that the transfers were complete and irrevocable and constituted taxable gifts and determined that the value of the gifts made by plaintiff to his four children aggregated \$106,250.00 and demanded additional gift taxes of \$7,774.15 from plaintiff. In arriving at the above values for gift tax purposes the Commissioner of Internal Revenue used a salary of \$12,000.00 per year for plaintiff in computing the past earnings and estimating the future earnings of the business, and in determining the value of the good will of the business.

Plaintiff paid to the defendant the federal gift taxes as demanded, together with interest thereon.

XIII.

As a consequence of the transfers made by plaintiff and Flo Parker to their four children, plaintiff owned a 25% interest in said assets and business, his wife owned a 25% interest in said assets and business, and his four children owned the other 50% interest in said assets and business, and his four children owned the other 50% in such assets and business. All six of them were tenants in common and it was necessary to have some formal

organization through which the business could be carried on. Accordingly, plaintiff, the father of the children, filed in the Superior Court of the State of California in and for the County of Orange, in which County the parties were then living, a petition for appointment of guardian. In this proceeding, Docket No. A-11392, the Superior Court appointed plaintiff, the father, as guardian, provided he filed four corporate surety bonds of \$23,000.00 each. Such surety bonds were promised on condition that the proposed guardian obtain an order of the Court instructing the guardian to enter into a partnership agreement with the other owners of the business and instructing the guardian to keep the property of the wards invested in the partnership interests and instructing the guardian, as partner, to retain in the partnership some of the profits of the business. Such court authorizations were obtained and Letters of Guardianship to Elgin R. Parker, plaintiff, were thereupon issued.

XIV.

Plaintiff, individually and as the guardian, and plaintiff's wife, Flo Parker, signed the articles of co-partnership to take effect as of November 1, 1943.

Each partner in the partnership of Southern Heater Company had an equal voice in the management of the business. Hence, the Superior Court, which appointed the guardian of the four guardianship estates, had four votes against one for plaintiff and one for plaintiff's wife and the Court had

control and management of the partnership business through the instrumentality of the guardian. Since November 1, 1943 the guardian has filed annual accounts with the Court and has the Court's approval thereon and has operated and managed the guardianship estates under the supervision and jurisdiction and under the orders of the Probate Court.

XV.

The partnership filed a certificate of fictitious firm name as required by California law and complied with other legal formalities. It has kept separate books of account, in which each partner's share of capital and income is credited to him.

XVI.

Plaintiff and his wife have continued to support their four children and none of the income of the children has been used for their support or that of the parents.

XVII.

The 1943 gifts by plaintiff and his wife to their four children of interests in the assets of the business, mentioned above, were completely valid and binding and vested in each child a $\frac{1}{8}$ th interest in the assets of the business of Southern Heater Company. Said gifts are irrevocable and the income from said assets and interests of the children is not the income of plaintiff or his wife. Capital was a material income producing factor in the business

of Southern Heater Company and the income from the children's portion of this capital was their own income and not the income of the parents. A salary equal to the value of the services rendered by plaintiff to the partnership has been paid and deducted before computing the distributable shares of the income of the partners.

XVIII.

Plaintiff's children were partners with plaintiff and his wife in the business known as Southern Heater Company and each partner, including the children, is taxable on his or her distributive share of the partnership income and plaintiff is not taxable on any of the distributable shares of the partnership income which belong to his four children.

XIX.

Plaintiff's total tax liability on his own income for the calendar year 1944 is \$40,176.75. Plaintiff has, upon the demand of the defendant, paid the defendant \$97,053.85 and has overpaid his 1944 income tax in the amount of \$56,777.10. Neither said amount nor any part thereof has been repaid to plaintiff. Plaintiff is the owner of said claim.

XX.

That by reason of the premises defendant became, and is, indebted to the plaintiff in the sum of \$56,777.10, plus interest of \$6,631.91 paid thereon, plus interest of 6% per annum on \$31,270.51

from July 12, 1947, until repaid to plaintiff, and plus interest on \$32,138.50 from October 8, 1947, until repaid to plaintiff, plus costs of this suit, together with such other relief as seems proper to the Court.

/s/ MELVIN D. WILSON,

/s/ JOSEPH D. PEELER,
Attorneys for Plaintiff.

State of California

County of Los Angeles—ss:

Elgin R. Parker, being duly sworn, deposes and says that he is the plaintiff in the foregoing Complaint; that he has read the Complaint and knows the contents thereof; and that the statements contained therein are true of his own knowledge.

/s/ ELGIN R. PARKER.

Subscribed and Sworn to before me this 23rd day of August, 1948.

[Seal] /s/ E. L. EVENSIZER,

Notary Public, in and for said County and State.

My commission expires: Nov. 6, 1950.

[Endorsed]: Filed Sept. 1, 1948.

In the United States District Court for the Southern
District of California, Central Division.

No. 8605-B

ELGIN R. PARKER,

Plaintiff,

vs.

HARRY C. WESTOVER, individually and as Col-
lector of Internal Revenue for the 6th District
of California,

Defendant.

ANSWER

Comes now Harry C. Westover, individually and
as Collector of Internal Revenue for the Sixth Dis-
trict of California, and in answer to plaintiff's com-
plaint herein admits, denies, and alleges:

I.

Admits the allegations contained in paragraph I
of the complaint.

II.

Admits the allegations contained in paragraph II
of the complaint.

III.

Answering paragraph III, defendant admits the
allegations except that he denies that the amounts
of taxes set out in said paragraph constituted plain-
tiff's entire tax liability for 1944.

IV.

Admits the allegations contained in paragraph IV of the complaint.

V.

Answering paragraph V, defendant admits said allegations except that it is alleged that the item of \$31,370.51 was paid on July 14, 1947, and the item of \$32,138.50 was paid on September 26, 1947.

VI.

Answering paragraph VI, defendant admits the filing of a claim for refund on or about the date alleged, but denies the correctness, validity and legal effectiveness of each and every allegation therein, and denies that the allegations set forth in said claim are sufficient to constitute a legal and valid claim for refund.

VII.

Answering paragraph VII, defendant admits that the Commissioner of Internal Revenue has not rendered a decision on said claim prior to the institution of this suit, but denies the remaining allegations in said paragraph.

VIII.

Admits the allegations contained in paragraph VIII of the complaint.

IX.

Denies each and every allegation contained in paragraph IX of the complaint.

X.

Denies each and every allegation contained in paragraph X thereof.

XI.

Admits the allegations contained in paragraph XI of the complaint.

XII.

Admits the allegations contained in paragraph XII thereof.

XIII.

Answering paragraph XIII, defendant admits that plaintiff filed an application for appointment of a guardian for his minor children, as alleged; that he was appointed guardian and that his bond was fixed in the amounts as alleged. It is further admitted that the court entered authorizations as alleged and issued letters of guardianship to this plaintiff as alleged. The remaining allegations in paragraph XIII are denied.

XIV.

Answering paragraph XIV, defendant admits the signing of the articles of co-partnership as alleged,

but denies each and every other allegation set forth in said paragraph.

XV.

Answering paragraph XV, defendant alleges that he does not have sufficient knowledge or information upon which to form a belief as to the truth of the allegations therein contained.

XVI.

Answering paragraph XVI, defendant alleges that he does not have sufficient knowledge or information upon which to form a belief as to the truth of the allegations therein contained.

XVII.

Denies each and every allegation contained in paragraph XVIII thereof.

XVIII.

Denies each and every allegation contained in paragraph XVIII.

XIX.

In answer to paragraph XIX, defendant admits that plaintiff has paid the amount therein alleged; that no part of said amount has been repaid to said plaintiff; and that plaintiff is the owner of said claim. Defendant denies all of the other allegations in said paragraph contained.

XX.

Denies each and every allegation contained in paragraph XX thereof.

Wherefore, defendant having fully answered the complaint prays that the complaint be dismissed with costs, and for all just and proper relief.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL,
Assistant United States
Attorney.

EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue.

By /s/ E. H. MITCHELL,
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed Feb. 8, 1949.

[Title of District Court and Causes.]

No. 8605 B and No. 8604 B.

STIPULATION FOR CONSOLIDATION

The above-entitled parties, through their common counsel, Melvin D. Wilson, Eeq., for the plaintiffs, and James M. Carter, United States Attorney, E.

H. Mitchell, Assistant United States Attorney,
Eugene Harpole, Special Attorney, Bureau of Internal Revenue, for the defendant, hereby stipulate that the above-entitled causes may be tried together and the evidence introduced in one case may be fully considered in the other case, and that there be but one jury, if the case is tried before a jury.

/s/ MELVIN D. WILSON,
Counsel for Plaintiffs.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL,
Assistant United States
Attorney.

EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue.

By /s/ E. H. MITCHELL,
Counsel for Defendant.

It is so ordered. February 26, 1949.

/s/ C. E. BEAUMONT,
Judge.

[Endorsed]: Filed February 28, 1949.

[Title of District Court and Causes.]

APPELLANTS' REQUESTED
INSTRUCTIONS.

No. 24.

One of the elements that you may consider in determining the validity of this partnership is the capital that was put into the business. You may consider the source of the capital of the partners and the fact that the capital of the children was given to them by their parents. A parent can make a gift of property to his children, which is valid under the laws of California, and an outright gift carries with it the absolute parting with the control and dominion of the thing that is given, so that the donee or the party receiving the gift is absolutely free of his own will to do whatever the donee might desire to do with the property. You may consider whether the gifts in this case were absolute or subject to some condition or control by the parents.

The fact that the children's share of the partnership was given to them by their parents would not prevent the partnership from being valid for income tax purposes, if the gift were complete and the partners really intended to form a genuine partnership.

Thomas vs. Feldman, 158 Fed. (2d) 488.

Armstrong vs. Commissioner, 143 Fed. (2d)
700.

No. A.

It is the law that the donee of an intra-family gift

can become a partner for Federal income tax purposes through investment of the capital in the family partnership.

Commissioner vs. Culbertson, 69 Supreme Court, 1210.

No. C.

You are instructed that if you believe from a preponderance of the evidence that the plaintiffs here gave interests in the business assets to their children, absolutely and unconditionally, and that thereafter the parents' economic situation was reduced by the capital they gave the children, and the income therefrom, and that the parents intended in good faith to have a bona fide partnership between themselves and the children for the operation of the business, then your verdict shall be for the plaintiffs.

Commissioner vs. Culbertson, 69 Supreme Court, 1210.

No. L.

The fact that transfers to members of the family group may be mere camouflage does not, however, mean that they invariably are. If the donee of property invests it in the family partnership and exercises dominion and control over that property—and through that control influences the conduct of the partnership and the disposition of its income—he may well be a true partner. Whether he is free to, and does, enjoy the fruits of the partnership is

strongly indicative of the reality of his participation in the enterprise.

Commissioner vs. Culbertson, 69 Supreme Court, 1210.

[Endorsed]: Filed April 10, 1950.

[Title of District Court and Causes.]

DEFENDANT'S REQUESTED
INSTRUCTION.

XXXI

You are instructed that common understanding and experience are the touchstones for the interpretation of the revenue laws. The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid. The one who earns income but gives the right to receive that income to a favorite child has enjoyed the benefit of that income within the meaning of the Internal Revenue Laws.

Helvering v. Horst (1940) 311 U.S. 112;
Section 22(a) of the Internal Revenue Code.

Respectfully submitted,

ERNEST A. TOLIN,

United States Attorney.

E. H. MITCHELL and
EDWARD R. McHALE,
Assistant United States
Attorneys.

EUGENE HARPOLE and
JAMES D. PETTUS,
Special Attorneys, Bureau of
Internal Revenue.

By /s/ EUGENE HARPOLE,
Attorneys for Defendant.

[Endorsed]: Filed April 10, 1950.

[Title of District Court and Causes.]

VERDICT OF THE JURY

Nos. 8604-BH and 8605-BH

We, the Jury in the above-entitled causes, find in favor of the Defendant, Harry C. Westover, Individually and as Collector of Internal Revenue for the Sixth District of California, in each cause.

Dated: Los Angeles, California, January 11, 1950.

/s/ E. RICHARD WEST,
Foreman of the Jury.

[Endorsed]: Filed January 11, 1950.

In the United States District Court, Southern
District of California, Central Division

No. 8605-BH

ELGIN R. PARKER,

Plaintiff,

vs.

HARRY C. WESTOVER, Individually and as
Collector of Internal Revenue for the Sixth
District of California,

Defendants.

JUDGMENT ON THE VERDICT

The above-entitled action was consolidated for trial with the case of "Flo Parker, Plaintiff, vs. Harry C. Westover, Individually and as Collector of Internal Revenue for the Sixth District of California, Defendant, No. 8604-BH," and came for trial before the Court sitting with a jury at Los Angeles, California, on January 10, 1950. The Plaintiff was represented by his counsel Melvin D. Wilson, and the defendant by his attorneys Ernest A. Tolin, United States Attorney for the Southern District of California; E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys for said District; James P. Garland, Special Assistant to the Attorney General, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue. A jury of twelve was selected and sworn to try the cause. Evidence both oral and documentary was introduced

and the cause argued by counsel for the respective parties; the jury was instructed by the Court as to the law of the case; the jury thereupon retired and after deliberation returned the following Verdict:

“Verdict of the Jury

“We, the Jury in the above-entitled causes, find in favor of the Defendant, Harry C. Westover, Individually and as Collector of Internal Revenue for the Sixth District of California, in each cause.

“Dated: Los Angeles, California, January 11, 1950.

E. RICHARD WEST,
Foreman of the Jury.”

Now, Therefore, It is Hereby Ordered, Adjudged and Decreed:

That the defendant, in accordance with the Verdict of the Jury, have and is hereby given judgment against the plaintiff, Elgin R. Parker, for defendant's costs in this action to be taxed by the Clerk in the sum of \$20.00.

Dated: This 12 day of January, 1950.

/s/ BEN HARRISON,
United States District Judge.

Approved as to form:

/s/ MELVIN D. WILSON,
Attorney for Plaintiff.

[Endorsed]: Filed and entered January 12, 1950.

In the United States District Court, Southern
District of California, Central Division

No. 8604-BH

FLO PARKER,

Plaintiff,

vs.

HARRY C. WESTOVER, Individually and as
Collector of Internal Revenue for the Sixth
District of California,

Defendant.

JUDGMENT ON THE VERDICT

The above-entitled action was consolidated for trial with the case of "Elgin R. Parker, Plaintiff, vs. Harry C. Westover, Individually and as Collector of Internal Revenue for the Sixth District of California, Defendant, No. 8605-BH," and came for trial before the Court sitting with a jury at Los Angeles, California, on January 10, 1950. The Plaintiff was represented by her counsel Melvin D. Wilson, and the defendant by his attorneys Ernest A. Tolin, United States Attorney for the Southern District of California; E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys for said District; James P. Garland, Special Assistant to the Attorney General, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue. A jury of twelve was selected and sworn to try the cause. Evidence both oral and documentary was introduced

and the cause argued by counsel for the respective parties; the jury was instructed by the Court as to the law of the case; the jury thereupon retired and after deliberation returned the following Verdict:

“Verdict of the Jury

“We, the Jury in the above-entitled causes, find in favor of the Defendant, Harry C. Westover, Individually and as Collector of Internal Revenue for the Sixth District of California, in each cause.

“Dated: Los Angeles, California, January 11, 1950.

E. RICHARD WEST,
Foreman of the Jury.”

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

That the defendant, in accordance with the Verdict of the Jury, have and is hereby given judgment against the plaintiff, Flo Parker, for defendant's costs in this action to be taxed by the Clerk in the sum of \$20.00.

Dated: This 12 day of January, 1950.

/s/ BEN HARRISON,
United States District Judge.

Approved as to form:

/s/ MELVIN D. WILSON,
Attorney for Plaintiff.

[Endorsed]: Filed and entered January 12, 1950.

United States District Court, Southern District of
California, Central Division

Melvin D. Wilson, Esq.,
819 Title Insurance Bldg.,
Los Angeles 13, Calif.

E. H. Mitchell, Esq.,
600 Federal Bldg.,
Los Angeles 12, Calif.

Re: Parker v. Westover, etc. No. 8604-BH.
and
Parker v. Westover, etc. No. 8605-BH.

NOTICE BY CLERK OF ENTRY OF
JUDGMENT

You are hereby notified that Judgments have been
entered this day in the above-entitled cases in Judg-
ment Book No. 63, pages 187 and 189 respectively.

Dated: Los Angeles, California, January 12,
1950.

EDMUND L. SMITH,
Clerk.

By /s/ C. A. SIMMONS,
Deputy Clerk.

[Title of District Court and Causes.]

No. 8604-BH and No. 8605-BH

NOTICE OF APPEAL

Notice is hereby given that Elgin R. Parker and Flo Parker, Plaintiffs, above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgments entered in these actions on January 12, 1950.

MELVIN S. WILSON,
Attorney for Appellants, Elgin R. Parker and Flo
Parker.

[Endorsed]: Filed February 9, 1950.

[Title of District Court and Causes.]

No. 8604-BH and No. 8605-BH

CONDITIONS OF CASH BOND

State of California,
County of Los Angeles—ss.

Melvin D. Wilson, being duly sworn deposes and says:

That he is the attorney for the plaintiffs, Elgin R. Parker and Flo Parker in the above-entitled matters.

That the cash bond of \$250.00 deposited herewith

is the property of the plaintiffs, Elgin R. Parker and Flo Parker.

That said cash bond of \$250.00 is deposited herewith as required by law and the rules of the Court, and is subject to the provisions of the Local Rule 8-C of the District Court of the United States for the Southern District of California, Central Division.

In other words, if the plaintiffs do not, in this case, pay the cost on appeal as provided by law, then the Court or the Clerk hereof, may in accordance with the provisions of Local Rule 8-C proceed against the plaintiffs and said cash bond in accordance with their obligations and may award execution thereon.

On the other hand, if the plaintiffs pay the cost of the appeal, then said cash bond is to be returned to the plaintiffs, also in accordance with the rules of the Court.

/s/ MELVIN D. WILSON.

Subscribed and sworn to before me this 9th day of February, 1950.

[Seal]: /s/ GRACE M. WHEELER,
Notary Public in and for said County and State.
My Commission Expires July 15, 1952.

The above cash bond has been examined and is recommended for approval as provided in Rule 8.

/s/ MELVIN D. WILSON,
Attorney for Plaintiffs.

[Endorsed]: Filed February 9, 1950.

[Title of District Court and Causes.]

No. 8605-BH Civil and No. 8604-BH Civil

STATEMENT OF POINTS RELIED ON

Now comes the plaintiffs in the above-entitled cases and file the following Statement of Points to Be Relied Upon in the appeal of the above-entitled causes and from the final judgments made by this Honorable Court on the 11th day of January, 1950.

1. The Court erred in failing to give the plaintiffs' requested instructions Nos. 24, A, C, L, and plaintiffs took exception thereto.

2. The Court erred in giving defendant's requested instruction, No. 31, over the objection and exception of the plaintiffs.

3. The Court erred in admitting, over plaintiffs' objection, Memorandum in re Incidence of Federal Tax Liability on 1944 Partnership Income.

4. The Court erred in admitting, over plaintiffs' objection, Application for Authority to Compromise Claims (6 pages) (Filed August 27, 1946).

5. The evidence is insufficient to justify the verdicts of the jury.

Wherefore, the plaintiffs pray that said Judgments on the verdicts be reversed, and that the United States District Court for the Southern District of California, Central Division, be ordered

to enter a decree reversing the decisions in said causes.

/s/ MELVIN D. WILSON,
Attorney for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed March 28, 1950.

[Title of District Court and Causes.]

No. 8605-BH Civil and No. 8604-BH Civil

DESIGNATION OF PORTIONS OF
RECORD ON APPEAL

To the Clerk of the United States District Court
in and for the Southern District of California,
Central Division:

Please issue a certified Transcript of Record in
the above-entitled cases on appeal to the Court
of Appeals for the Ninth Circuit, consisting of the
following:

1. Complaints.
2. Answers to Complaints.
3. Demands for Jury Trials.
4. Stipulation for the Consolidation of Cases
for Trial.
5. Statement of the Evidence.
6. The Judge's Instructions to the Jury.

7. Plaintiff's Requested Instructions Nos. 24, No. A, No. C, No. L.

8. Defendant's Requested Instruction, No. 31.

9. Exceptions to the Judge's Instructions.

10. The Verdicts of the Jury.

11. The Judgments Appealed From.

12. Notice by Clerk of Entry of Judgments.

13. Notices of Appeal with dates of filing.

14. The Designation as to Matters to be included in the record.

15. Designation of Points on which Appellants Intend to Rely.

16. Cost Bond.

Dated this 27th day of March, 1950.

/s/ MELVIN D. WILSON,
Attorney for Appellants.

To Ernest A. Tolin, United States Attorney; E. H. Mitchell and Eugene Harpole, Special Attorneys, Bureau of Internal Revenue; James Garland, Special Assistant to the Attorney General:

Please take notice that the foregoing Designation of Portions of Record on Appeal is being filed forthwith in the above-entitled case.

/s/ MELVIN D. WILSON,
Counsel for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed March 28, 1950.

[Title of District Court and Causes.]

No. 8604-BH and No. 8605-BH

DEFENDANT - APPELLEE'S DESIGNATION
OF ADDITIONAL PORTIONS OF REC-
ORD ON APPEAL

Defendant-Appellee requests that the following additional portions of the trial evidence in above cases be incorporated in the record on appeal, to wit:

1. The reporter's transcript of proceedings of January 10 and January 11, 1950.

2. Defendant's Exhibits A, B, C and D.

Dated April 6, 1950.

ERNEST A. TOLIN,
United States Attorney.

E. H. MITCHELL and
EDWARD R. McHALE,
Assistant United States
Attorneys.

EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue.

By /s/ E. H. MITCHELL,
Attorneys for Defendant-
Appellee.

[Endorsed]: Filed April 6, 1950.

[Title of District Court and Causes.]

No. 8605-BH Civil and No. 8604-BH Civil

STATEMENT OF EVIDENCE

Condensation of the Oral Testimony Given
at the Trial

ELGIN R. PARKER

called as a witness on behalf of the plaintiffs being
first duly sworn testified as follows:

Direct Examination

My name is Elgin R. Parker. I am one of the
plaintiffs in this case.

I graduated from grammar school in Los Angeles. I started to work when I was 13. I went into business for myself when I was 16 and I have been in business for myself ever since. I have worked for corporations on and off. I have been in partnerships. In 1936 I went into bankruptcy. This was due mostly to real estate investments, foreclosures and deficiency judgments.

At the time I went into bankruptcy I was working for a water heating concern. I kept on working for them. I saved my salary and received a gift from my brother-in-law and sister and these helped me to make some investments from all of which I went into business for myself.

My children's names and birth dates are as follows: Dian, 1920; Patricia, 1932; Rowland, 1937;

(Testimony of Elgin R. Parker.)

Arthur, 1940, and I have another daughter who was born in 1945.

My wife has never worked in or for any company that I have been associated with, nor has she worked outside of our home or business.

In 1942 I entered into a written partnership agreement with my wife in which our interests were equal. I took a salary of \$12,000.00 a year from that firm. My wife did not work in that partnership nor did she sign checks for the partnership. That firm was dissolved in November of 1943.

I made a gift to each of my four children who were living on October 31, 1943, of a sixth and a quarter per cent ($6\frac{1}{4}\%$) interest in the assets that were being used in the business operated on that date by my wife and myself in partnership. My wife made a similar gift to each of the four children. Our purpose in making these gifts was to try to tie the children into the business for the purpose of interesting them in the business and keeping the family together. We had business reverses before and we wanted them to have some assets of their own.

After making the gifts, I applied to the Superior Court of the County in which we were living for appointment as guardian of the properties of my children so that the children would have some one to look after the assets under the supervision of the Court.

The Surety Company whom I approached to go

(Testimony of Elgin R. Parker.)

on the Guardian Bond required that I get orders from the Court to invest the children's property in a business and to enter into a written partnership agreement with the other owners of the business and retain some of the earnings in the business.

The gifts my wife and I made to the children were irrevocable and unconditional. We asked the Court's approval to keep the children's assets in the business and partnership but the Court could have done as it pleased with it.

When the partnership was dissolved I published a notice of dissolution in the paper.

Neither my wife nor I filed claims for refund for the gift tax.

Since October, 1943, I have supported my children out of the assets and income belonging to myself and wife.

The guardianships have not sold any property to me as an individual nor have the guardianships suffered any losses. The guardianships have expended money for income taxes and premium on bonds, and attorneys' fees.

The summary of capital accounts of the partnership taken from the books of the partnership for the period November 1, 1943, to October 31, 1948, shows the children's share of the capital and income of the business during that period and the disbursements charged against their shares. The withdrawals shown were paid out in cash.

(Testimony of Elgin R. Parker.)

When the partnership was dissolved and terminated on October 31, 1943, the assets were distributed and each of the four guardianships received assets which cost \$84,589.91. In addition each guardianship received \$3750.00 in Government bonds.

The income of the partnership for 1944, after paying my salary of \$12,000.00, was approximately \$252,000.00. My wife and I were entitled to fifty per cent or \$126,000.00 plus our \$12,000.00 salary making our total share of the income \$138,000.00. After the Commissioner of Internal Revenue disregarded the children as partners, he wanted a total tax from my wife and myself of \$193,00.00. This was \$55,000.00 more than my wife and myself had a right to receive from the partnership for 1944. The children's share of the partnership income for that year was \$126,000.00 and under the Commissioner's contention that would be free from income tax.

As a result of the above situation, I filed an application to the Superior Court to adjust the taxes or to adjust the partnership income. The Court made an order for authority to compromise claims which is admitted in this case as Exhibit No. 16.

When we made the gifts and formed the partnership, we thought the children would be taxable on their share of the partnership income and, of course, they would keep the balance of the income after taxes. When the Commissioner ruled that the children were not taxable and gave them refunds, my wife and I thought that we ought to be

(Testimony of Elgin R. Parker.)

permitted to get the refunds to help us pay our additional taxes and that was the basis of our petition to the Superior Court.

The factors that contributed toward the production of the income of the Southern Heater Company for the year ending October 31, were the plant, capital and a going organization and the ability or good luck in getting allocation of materials to manufacture water heaters and, of course, labor and management.

On October 31, 1943, our business was being run on a three months basis. When an allocation for material was received, I could set up a program for three months. Beyond that I couldn't figure anything. It made it uncertain as to whether we could stay in the water heater manufacturing business as water heaters weren't considered essential and we might not get further allocations of material. Under these facts I did not know whether we would make a profit or not.

The salary of \$12,000.00 per year for my services fixed in the partnership agreement dated November 1, 1943, was arrived at after checking with various officials of different companies on what they were receiving for like work and taking into consideration the fact that I was getting \$12,000.00 a year from the previous partnership with my wife; the fact that I have never received a salary in excess of that from any employer. Furthermore, this salary of \$12,000.00 per year was about twice as much as I paid any of the other executives of the

(Testimony of Elgin R. Parker.)

company. Also I checked with our auditor who had access to other concerns and he thought that \$12,000.00 would be a reasonable salary for my services. I thought it would be a reasonable salary and still think so and I intended to take a full and adequate salary for my services rendered to the partnership.

I intended to enter into a bona fide genuine partnership between my wife and children when I made the gifts to the children and entered into the partnership with them and my wife. I intended in good faith to conduct the business of Southern Heater Company in partnership with my wife and children.

After the partnership was formed and I was appointed guardian by the Court, I continued to direct the business as a practical matter, but in fact I applied to the Court for instruction whenever any step involved considerable hazard or considerable money. For instance, I went to the Court for instructions and approval when I wanted to put some of the partnership assets into corporations and obtained the Court's approval therefor.

After my wife and I gave a half interest in the assets and business to our children, the income of my wife and myself was cut in half and, of course, our ownership in the assets was cut in half. Our living expenses went on as before except that my wife and I paid for them out of our half of the income.

(Testimony of Elgin R. Parker.)

Cross-Examination

Questions by Mr. James P. Garland, Special Assistant to the Attorney General.

The books and records of the partnership are in Court.

The net income of our business prior to forming the partnership with the children on November 1, 1943, was approximately as follows: 1940, \$22,500.00; 1941, \$60,000.00; 1942, \$93,000.00; for the period from January 1, 1943, to October 31, 1943, approximately \$140,160.00.

The partnership returns for the partnership formed on November 1, 1943, with my wife and children shows net income as follows: 1944, \$260,576.89; 1945, \$231,137.16; 1946, \$306,050.28.

The income tax returns covering these businesses was prepared by Meyer Pritkin & Company.

While the income from the business owned by my wife and myself increased and the income taxes thereon increased, I did not become concerned about it. My tax auditor did not suggest that I arrange a family partnership to divide the income for income tax purposes. I wanted to make the gifts to the children and set up a separate estate for them. I had been thinking about it for a long time but I had put it off. I know that any business is hazardous but I wanted to set up an interest for the children, to have some impartial observer pass on it, and hope that they would have something, regardless of what eventually happened to the business

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(Testimony of Elgin R. Parker.)

itself. I hoped that the business would earn and the children could withdraw some of the earnings and would have those separate and apart even though the business might fail and they would lose the rest of the assets.

There were no withdrawals by the children or the guardianship from the partnership in 1944, except for income taxes. There were withdrawals for each guardianship in 1945 of \$3750.00 which were put into Government bonds.

I realize that my wife and I are each suing the Federal Government for approximately \$50,000.00 for 1944 and approximately the same amounts will be involved for 1945 and 1946.

I realize that the business had substantial income for 1942 and that the income tax on that income was also substantial. When we made the gifts to the children we hoped that we would not have to go out of business. We hoped that the children would be permitted to become partners and that the business would continue to earn. We hoped that it would have a profit thereafter. Our purpose in making the gifts and forming a partnership was to give security to our children regardless of our own fortune.

My tax counsel did not advise me to arrange this family partnership. He said that if a family partnership was set up and done legally, all the partners would pay the tax on their own income. I talked to him about this before the partnership

(Testimony of Elgin R. Parker.)

was arranged. He said there was a possibility of saving income taxes. I talked to him for the first time after I had decided to make the gifts and form the family partnership. I wanted my children in the business with me regardless of their age. My children did not have any outside capital. We intended to give them the capital so they could get into the business. They did not have any outside assets which could be put into use by the partnership for the purpose of credit. My young children did not contribute any service. These factors were true with respect to all my children at that time.

Eventually the partnership was dissolved and the assets distributed and each partner or guardianship received assets which cost approximately \$84,000.00, plus the \$3,750.00 bonds each guardianship already owned.

My wife and I have filed claims against the guardianship estates to be allowed a credit of \$111,151.89 against the guardianship estates on account of 1944 income taxes. The Commissioner of Internal Revenue made refunds to the four children for 1944 of approximately \$55,000.00. By approval of the Probate Court my wife and I used those refunds to help pay our deficiencies for 1944. We have asked the Superior Court, in the event we lose this income tax case, to reallocate the income between the children and ourselves to us to distribute the income tax burden in proportion to the distribution of the income.

(Testimony of Elgin R. Parker.)

The Superior Court would not grant the request but did hold it in abeyance.

Mr. Garland: May I now offer it in evidence, the certification of some twenty-eight documents listed on the first page, being authenticated, and is substantially the entire file, as I understand, at least part of the file of the guardianship estates. I will introduce all these papers.

The Court: Any objection?

Mr. Wilson: I object to the one that he has been discussing, because it has a statement by Mr. Parker as to the status of the law on family partnerships, which is a matter of opinion and could not be taken as an admission of any kind by him. And also the same objection is made to the memorandum signed by myself. It states matters of opinion.

Mr. Garland: I have made my offer.

Mr. Wilson: To the rest of them I have no objection.

The Court: They will be introduced.

The Clerk: Defendant's Exhibit A in evidence.

(The documents referred to were marked Defendant's Exhibit A and were received in evidence.)

The Memorandum in re Incidence of Federal Income Taxation on Partnership Income signed by Melvin D. Wilson does not bear my signature. I authorized him to file papers on my behalf in the guardianship matter.

(Testimony of Elgin R. Parker.)

Mr. Garland: This memorandum is on page 2 of the Memorandum in re Incidence of Federal Income Tax Liability on 1944 partnership income: "The father received a salary of but \$12,000.00, whereas his services were worth at least \$52,000.00 per year. If a fair and full salary of \$52,000.00 per year had been paid the father, a result more comparable to that shown in situation C would have obtained.

"The parents furnished all of the capital, do all the work and support the children, so should be taken care of first."

In the Application for Instructions on Investments of Funds of the Ward which I signed under oath, I was referring to the income taxes of myself and wife when I said:

"It is to the best interests of the said guardianship estate, from the standpoint of participating in the earnings of a going business, and from the standpoint of income and estate taxes, that a guardian enter into a partnership agreement and continue to own an interest in the Southern Heater Heater Company."

As guardian, I signed the acceptance of proposed over-assessment, wherein the Commissioner granted over-assessments to each of my four children for 1944. I signed these April 30, 1947, and used the refunds amounting to approximately \$13,986.09 apiece from each of my children to help my wife and myself pay our additional taxes for 1944. We did this with the Court's approval.

(Testimony of Elgin R. Parker.)

When we made the gifts to our children, we hoped that the business would not have to be liquidated but with the gifts to the children, the control of the business passed from us to the Probate Court. Such a liquidation would have resulted in a loss to us, the children and everybody. We wanted them to have an interest in a going business.

A girl child was born to my wife and myself in 1945, two years after the partnership was formed. At the time of the birth of that child my wife and I had a fifty per cent interest in the business. We did not give her an interest in the business because of this tax litigation but we prepared an interest for her in our wills.

Redirect Examination

When we formed the partnership with the children, we expected to distribute earnings as fast as we could. The business grew so fast that it took all of its capital to carry it on and, therefore, we could not make greater distributions.

Before talking with anyone, my wife and I decided we wanted a partnership. We asked our auditor what he knew about the details of it. He advised us to take it up with counsel, which we did. Counsel told us that if properly drawn, he thought such a partnership would stand on its own feet if we would make irrevocable gifts so we couldn't get them back and that the children would

(Testimony of Elgin R. Parker.)

have an interest in the assets we gave them. We had made up our minds to make the gifts to the children and form the family partnership before we consulted our C.P.A. or tax counsel.

After discussion with the accountant and the counsel, we went ahead with the original plan of making the gifts and forming the family partnership.

I never told my counsel that my services were worth \$52,000.00 a year. I thought it was very complimentary. I did not see that memorandum before he filed it. I do not believe my services were worth \$52,000.00 in the year 1944.

Recross-Examination

My wife and I made up our minds to make the gifts and set up a family partnership before we talked to our tax counsel or auditor about the tax consequences of this transaction. The conversation with our auditor and counsel was before the gifts were made and before the partnership agreement was entered into.

After my attorney filed the Memorandum in re Incidence of Federal Income Taxation on Partnership Income for 1944, he sent me a copy later. I did not go to the State Court and disaffirm that.

Redirect Examination

Before we consulted our accountant or attorney, I realized that the gift and partnership should save family income taxes.

ELEANOR FLO PARKER

called as a witness by and on behalf of the plaintiffs, being first duly sworn was examined and testified as follows:

My name is Eleanor Flo Parker. I am one of the plaintiffs in this case.

My husband, Elgin R. Parker, suggested to me that we make gifts to the children; that we would probably have to form a partnership.

We felt that we would like security for the children and wanted them as partners in the business and wanted to build up an estate for them and perhaps tie them into the business as we wanted them to carry it on.

I did not realize that this gift, this arrangement, might save income taxes. That was not brought up in my discussion with my husband. I did not seek counsel before we made up our minds to make the gifts and form the partnership.

I have never performed any services for the partnership that was formed in November, 1943. I have never signed checks for the partnership. I never performed any services for the previous partnership between my husband and myself. I never signed any checks for that partnership. I have never brought any money into the family or into this business that came from gifts or inheritance. I have never worked outside of the family or earned any money since I have been married. I did not have any money or property when I was married.

The Government has recognized me as a partner in this partnership.

(Testimony of Eleanor Flo Parker.)

Cross-Examination

The income from the business was community income from community property and was divisible between my husband and myself for income tax purposes.

My husband and myself paid substantial income taxes for 1942 and for 1943. My husband drew the checks in payment of these taxes and took care of the business. I presume I knew that the taxes were substantial in amount.

I had not given any thought to the possibility that to divide the income between my husband and myself and the four children would reduce the amount of tax each of us would have to pay.

I never suggested or insisted that any of the children's distributable shares of the income for 1943, 1944, 1945 or 1946 should be distributed and put in their guardianship accounts. Part of the income was distributed and invested in Government Bonds for the children, \$3,750.00 each.

I was busy at home and my husband took care of the business. I signed whatever papers he had prepared for me to sign.

I did have a half interest in the business and I gave an interest to the children and I did not know that I would save income taxes by doing it.

CAPITOLA FIERKE

called as a witness by and on behalf of the plaintiffs being first duly sworn was examined and testified as follows:

My name is Capitola Fierke. I was Office Manager for the Southern Heater Company. I have been associated with Mr. Parker since 1936 in his various enterprises and in 1944 was Office Manager for the Southern Heater Company, the partnership that is in controversy.

I had charge of the books of the partnership. A new set of books was set up for it. The capital interests and the income of each partner was credited to their accounts on the books. All the accounting for the partnership was under my charge.

Mr. Parker and the auditors told me that the children had become partners at the time we set up the books for the new partnership.

Mrs. Parker may have talked to me a little bit about it later on. Mrs. Parker is not very active in the business.

MEYER PRITKIN

called as a witness by and on behalf of the plaintiffs being first duly sworn was examined and testified as follows:

My name is Meyer Pritkin. I am a Certified Public Accountant authorized to practice as such under the laws of California.

I have known Elgin R. Parker for approximately

(Testimony of Meyer Pritkin.)

18 or 20 years. I have done work for him throughout that period of time. I was the outside auditor or C.P.A. for the partnership consisting of Mr. and Mrs. Parker in the year 1943.

Mr. Parker spoke to me about giving to his children interests in the business and bringing them in as partners. I discussed this with him on one of my visits to his office and asked him the reason for wanting to do this. Among other things, he mentioned the fact that he felt that having gone beyond the period where he had financial reverses and that the business had reached a point of maturity so far as capital was concerned, he felt he would like to set up something for the children in the way of building a future interest for them and developing a future interest in the business and it was by way of them participating at a later date.

I sensed that the procedures to carry this out would be technical and that he should consult legal counsel in order that the matter would be handled in a proper manner.

I suggested to him that a gift to the children in the formation of a partnership with them as partners would reduce the family income taxes. I told him that the gifts would be irrevocable and the children would own the assets but the parents might still be taxable on the children's income and that would present some complications. Therefore, I advised him to consult an attorney.

Mr. Parker asked me for my opinion as to what

(Testimony of Meyer Pritkin.)

would constitute a reasonable salary for the services he was expected to render to this new partnership. I recalled that I had advised him the year before that a reasonable salary for the services to the partnership between himself and his wife would be \$12,000.00 a year and the prior partnership was paying that amount. I thought that conditions had not changed much so far as relating to his services in the intervening year's time, so I suggested the same salary of \$12,000.00 per year. I have had a lot of experience in tax matters.

Cross-Examination

Mr. Parker did not mention tax savings to me in connection with the gifts to the children and forming a partnership. I suggested it to him after he had told me of his plan to make the gifts and form the partnership. That of course was before the partnership was formed.

I was on a retainer with his company for accounting, auditing, preparation of tax returns, etc. I have been doing that type of work for him for 15 years or more. The giving of tax advice in a general way is part of the responsibilities of an accountant and plans for minimizing taxes to a degree, not attempting to borrow litigation, is also part of this work.

I advised Mr. Parker about the tax consequences and the organizational complications of the entire set-up.

(Testimony of Meyer Pritkin.)

I did not talk to Mr. Wilson about the figure, \$52,000.00, as a value of Mr. Parker's services for 1944. I do not know where he got that figure.

Re-Direct Examination

Prior to the time that Mr. Parker had told me he wanted to make a gift to the children, I had never suggested to him that such a procedure would save income taxes.

Re-Cross-Examination

I did discuss with Mr. Parker's counsel the matter of the filing of the petition with the Probate Court with a Claim for Tax Adjustment in the guardianship proceedings. I do not recall if I prepared any of the papers that went into that proceeding.

J. CURTIS ENGLE

called as a witness by and on behalf of the defendant being first duly sworn was examined and testified as follows:

Direct Examination

My name is J. Curtis Engle. I am an Internal Revenue Agent. I have been such for 16 years. At the present time I am stationed in Phoenix, Arizona. I work out of the Los Angeles office however.

I examined the returns of Elgin R. Parker and Flo Parker and children for the year 1944. I exam-

(Testimony of J. Curtis Engle.)

ined the individual returns and the partnership returns. I noticed that the partnership returns showed newly admitted partners so I inquired as to the capital and services they performed and I found that the new partnership afforded no necessary business purpose and I therefore recommended that it be denied for income tax purposes and that the income be taxed to the two original partners, Elgin R. Parker and Flo Parker. I recommended that refunds be made to the children.

CHESTER F. PERRY

called as a witness by and on behalf of the defendant being first duly sworn was examined and testified as follows:

My name is Chester F. Perry. I have been in the Government service since April of 1946. I investigated the income tax returns of Mr. and Mrs. Elgin R. Parker and their children for the years subsequent to 1944. I investigated the returns about in the same manner as had been done for the previous year, and included the children's income in the returns of the parents. I have made computations showing the tax consequences for the years 1945 and 1946.

ROY E. KELLY

called as a witness by and on behalf of the defendant being first duly sworn was examined and testified as follows:

My name is Roy E. Kelly. I came into the Internal Revenue Service in July of 1941. I have been in such service since that time except for two and a half years military leave.

I was assigned to examine the claims filed for the recovery of the taxes for 1944 and the claims were rejected. I examined the evidence in our files and talked to the taxpayer by telephone and he referred me to his attorney who advised that suit had been started. I recommended a rejection of the claims and the Commissioner followed my recommendation.

Cross-Examination

We had instructions from Washington to consider the merits of family partnership cases.

The defendant rests. We want to file with the Court a written motion for a directed verdict on the grounds therein stated.

The Court: The motion is denied.

Condensation of Other Evidence

The complaints allege and the answers admit certain facts, and plaintiffs' attorney at the beginning of the trial read to the Jury the statements contained in the complaints which were admitted in the answers.

During the trial, the parties entered into oral stipulations as follows:

1. That any documents that were admitted into evidence should be shown to the Jury.

2. That the bonds required by the Probate Court were filed for each guardianship estate.

3. That the Federal income taxes of the four Parker children as shown on their 1944 returns were paid to the defendant and were refunded to the children.

4. The plaintiffs filed claims for refund in proper legal form and within the time provided by law, covering the grounds set forth in the complaint.

5. That the full jury was in the box throughout the entire trial.

The plaintiffs introduced into Evidence Exhibits numbered 1 to 16, inclusive, which are set out herein in full or digested as follows:

Exhibit 1: Elgin R. Parker's Deed of Gift to the four children which is identical with Exhibit 2 excepting the name of the grantor.

Exhibit 2: Flo Parker's Deed of Gift to the four children which is identical with Exhibit 1 excepting the name of the grantor and balance sheet of taxpayer.

PLAINTIFFS EXHIBIT No. 2

Deed of Gift

Flo Parker, of the County of Orange, State of California, in consideration of the love and affection she bears to her children, hereinafter named, does hereby give, transfer, assign, convey and deed, out of her sole and separate property, twelve and one-half per cent of all her right, title and interest in and to the following described property, to each of her children, as his or her sole and separate property, as follows:

Flo Dian Parker born August 1, 1929,
Patricia Lee Parker, born September 19, 1932,
Rowland Tibbetts Parker, born May 1, 1937,
Arthur Elgin Parker, born September 8, 1940.

Flo Parker is a partner in the partnership known as Southern Heater Company, which operates a business of manufacturing and selling heaters, said business being conducted at 133 East Palmer Street, Compton, California, and said partnership also carries on the same type of business under various other names, such as Merit Heater Company, United States Heater Company, Crown Heater Company, Southern Galvanizing Company and Bessemer Engineering Company.

Flo Parker owns a one-half interest in said partnership and a one-half interest in all the assets thereof, and by this instrument gives to each of her above-named children a six and one-quarter per cent interest in the said partnership and in the

assets of said partnership, as of the close of business October 31, 1943. Said assets in said partnership are more particularly described as follows:

Cash on hand and in bank, accounts receivable, merchandise inventories, inventories of materials and supplies and finished goods, buildings on the real estate hereinafter described, machinery and equipment located in the buildings on the property hereinafter described, as well as shop tools, dies, furniture and fixtures, delivery equipment, deferred accounts, accounts receivable (employees'), unexpired insurance, sundry deposits, patents and trade-marks and good will, and other assets, all appertaining to the businesses of the partnerships mentioned above, carried on at 133 East Palmer Street in Compton, California, or on the property hereinafter described.

The real estate owned by said partnership and involved by this deed of gift is further described as follows:

Land on which the Plant stands:

Those portions of Wright's Addition to the Town of Compton, as per map recorded in Book 7, Page 55 of Miscellaneous Records, and of Range 1 of the Temple and Gibson Tract, as per map thereof recorded in Book 2, Pages 540 and 541 of Miscellaneous Records, in the City of Compton, County of Los Angeles, State of California, described as follows:

Beginning at the Southwest corner of Lot 2 in Block 5 of said Wright's Addition to the Town of Compton, said Southwest corner being in the East-

erly line of Wilmington Street as said street is shown on the Map of Tract No. 759, as per Map thereof recorded in Book 16, Page 13 of Maps; thence northerly, along the said Easterly line of Wilmington Street, 871.2 feet, to the southwest corner of Block "I" of Tract No. 8765, as per map thereof recorded in Book 41, Pages 88 and 89 of Maps; thence Easterly, along the Southerly line of said Block "I," 500 feet, to the Southeast corner of said Block "I"; thence southerly parallel with the Easterly line of Wilmington Street, as hereinbefore described, 871.2 feet to the Southeast corner of Block 5 of Wright's Addition to the Town of Compton, hereinbefore described; thence Westerly, along the Southerly line of said Block 5, a distance of 500 feet, to the point of beginning.

Otherwise known as 133 East Palmer, Compton, California.

it being understood that the donor is giving a six and one-quarter per cent interest in and to said assets and real estate to each of her said children named above.

The gifts, assignments and conveyances of the six and one-quarter per cent interest in and to the partnership and in and to the assets of the said partnership are subject to the liabilities of the partnership, as shown in Schedule "A," attached hereto, and to such further liabilities for renegotiations, Federal Income Taxes on Flo Parker and Elgin R. Parker, for the years 1941, 1942, and 1943, as may finally be determined to be due, and for

such other liabilities as may arise and be determined to be a liability of the business as of October 31, 1943, including liabilities to Flo Parker and Elgin R. Parker, as shown in Exhibit "A."

To Have and To Hold to the several Grantees as their respective sole and separate property.

Witness my hand this thirty-first day of October, 1943.

/s/ FLO PARKER.

State of California

County of Los Angeles—ss.

On this thirty-first day of October, 1943, before me, a Notary Public in and for said County, personally appeared Flo Parker, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged that she executed the same.

Witness my hand and official seal.

[Seal] /s/ CAPITOLA FIERKE,

Notary Public in and for said
County and State.

My commission expires Sept. 28, 1946.

The above gifts are from the separate property of my wife, Flo Parker, and while I have no interest in said property, I approve of such gifts.

/s/ ELGIN R. PARKER.

Filed Jan. 10, 1950.

Exhibits 3, 11: These exhibits comprise copies of 13 documents that were filed by Elgin R. Parker as the guardian for the guardianship estates of his four minor children in the Superior Court of the State of California, in and for the County of Orange, in the proceeding entitled "In the Matter of the Guardianship of Flo Dian Parker, Patricia Lee Parker, Rowland Tibbetts Parker and Arthur Elgin Parker, minors, Docket No. A-11392." The following digest of these documents is considered sufficient for the purposes of this appeal.

A. Petition for Appointment of Guardian signed by Elgin R. Parker requesting that he be appointed guardian of the estates of his four above-named children, stating their ages are 14, 11, 6 and 3 years, respectively; that each child owns a $12\frac{1}{2}\%$ interest in and to the partnership known as Southern Heater Company and in and to the assets owned by said partnership. The real estate was described as were the other assets and liabilities, by Exhibit A, attached. The petition stated that the value of the personal property of each minor was \$19,646.18 and the value of the real estate of each minor was \$7,214.23 and that the probable annual income was \$3,000.00 for each minor. The mother, Flo Parker, approved the appointment of her husband, Elgin R. Parker, and Flo Dian Parker, who was 14 years of age, nominated and requested the appointment of her father, Elgin R. Parker, as guardian of her estate. This petition was filed December, 1943,

B. Application for Instruction on Investment of Funds of Wards filed February 7, 1944, by Elgin R. Parker, as guardian.

In the Superior Court of the State of California
In and for the County of Orange

No. A-11392

In the Matter of the Guardianship of FLO DIAN
PARKER, PATRICIA LEE PARKER,
ROWLAND TIBBETTS PARKER, and
ARTHUR ELGIN PARKER,

Minors.

APPLICATION FOR INSTRUCTION ON
INVESTMENT OF FUNDS OF WARDS

To the Superior Court of the State of California,
In and for the County of Orange:

Petitioner, Elgin R. Parker, represents as follows:

That he filed a petition for appointment of guardian of his minor children, Flo Dian Parker, Patricia Lee Parker, Rowland Tibbetts Parker, and Arthur Elgin Parker, in the above-entitled Court, and that on the thirty-first day of December, 1943, the Honorable Court made an order appointing him guardian upon his giving a bond to said minors, and each of them, if given by a surety company authorized to furnish such bond, in the sum of Twenty-three Thousand Dollars (\$23,000), and taking the oath required by law;

That your petitioner has taken up with several surety companies the matter of procuring said bonds.

The only condition upon which any surety company will write these bonds is that the Court make an order under Section 1557 of the Probate Code, instructing the guardian to enter into the partnership agreement with other owners of interests in the business known as Southern Heater Company, and instructing the guardian to keep the property of the wards invested in the partnership interests of said Southern Heater Company, with authority in the guardian, as partner, to retain in the partnership some of the profits of the business.

As a matter of background, it may be explained that your petitioner, Elgin R. Parker, and his wife, Flo Parker, were, prior to October 31, 1943, equal copartners and owners of the business of manufacturing heaters, with a business address at 133 East Palmer Street, Compton, California.

On October 31, 1943, affiant gave to each of his four children a $6\frac{1}{4}$ per cent interest in and to the assets of said partnership and in said partnership interest, and Flo Parker, the mother of said children, gave to each of said four children a $6\frac{1}{4}$ per cent interest in and to the assets of said partnership, and interest in said partnership, with the result that your petitioner owns a 25 per cent interest in said business, his wife, Flo Parker, owns a 25 per cent interest in said business, and each of the four children own a $12\frac{1}{2}$ per cent interest in said business.

It is now necessary for a new partnership agreement to be entered into by and between the petitioner, his wife, and the guardian for the four guardianship estates.

Petitioner has built up said business to the point where it earns a substantial profit, and earned a substantial profit before the war. A copy of the balance sheet was attached to the original petition for appointment of the guardian. It shows that the business is in good financial condition.

It is to the best interests of the said guardianship estates, from the standpoint of participating in the earnings of a going business, and from the standpoint of income and estate taxes, that the guardian enter into a partnership agreement and continue to own an interest in the said partnership of Southern Heater Company. It is expected that the business will continue to prosper, and that the guardianship estates will enjoy their share of the profits and that substantial estates will be built up for the said wards. It will be prudent for the partnership to retain some of the profits, in good years, to enable the firm to tide over lean years.

On the other hand, should your petitioner fail to secure the instruction he needs, so that he will be unable to qualify as guardian, the interest in the business which the wards now own would probably have to be sold or liquidated. Your petitioner and his wife are probably the only persons who would want to buy an interest in this closely held business, and your petitioner is not in a financial position to do so. The result would be that the business would

probably have to be liquidated and the properties of the wards invested in low interest-bearing securities, and your petitioner would have his business terminated. Under said circumstances the income from the wards' estates, and perhaps the capital of the wards' estates, might have to be used for their support, with the end that the guardianship estates would suerly be reduced and perhaps entirely used up.

Consequently, your petitioner can confidently say that it is to the best interests of the guardianship estates that the original plans be carried forward, and that the Court order and instruct your petitioner to retain the interest in the partnership and enter into a new partnership agreement, in a form to be approved by the Court, which agreement will authorize the partnership to retain some of the profits.

Wherefore, petitioner prays for a hearing on the petition and that the Court make an order authorizing and instructing your petitioner to enter into a partnership agreement with your petitioner, Flo Parker, and the guardian for the four guardianship estates; the business to be known as the Southern Heater Company; which said business also uses various other names, such as Merit Heater Company, United States Heater Company, Crown Heater Company, Southern Galvanizing Company, and Bessemer Engineering Company, said partnership agreement to authorize the partnership to retain profits in the business, at the discretion of the partners, and instructing your petitioner to con-

tinue to hold the interests in said partnership business and assets; and for further orders as may be proper in the premises.

In view of the fact that your petitioner is the guardian, it is requested that the Court order that notice be dispensed with.

Dated February 3, 1944.

/s/ ELGIN R. PARKER,
Petitioner.

/s/ MELVIN D. WILSON,
Attorney for Petitioner.

State of California
County of Orange—ss.

Elgin R. Parker, being duly sworn, deposes and says that he is the petitioner in the above and foregoing petition; that he has read the petition and knows the contents thereof, and that same is true of his own knowledge, except as to the matters which are therein stated upon information and belief, and as to those matters he believes it to be true.

/s/ ELGIN R. PARKER.

Subscribed and sworn to before me, a Notary Public, this 3rd day of February, 1944.

[Seal] /s/ CAPITOLA FIERKE,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Sept. 28, 1946.

[Endorsed]: Filed Feb. 7, 1944.

C. Order Instructing Guardian on Investment of Guardianship Funds filed February 7, 1944. The order authorized the guardian to act, as prayed in the Application for Instructions on Investment of Funds of Wards.

D. Petition for Instruction on Signing a Partnership Agreement filed March 15, 1944. A copy of the proposed Partnership Agreement approved by the guardian was filed with the Court and the guardian requested the Court for authority and instruction to sign as guardian said partnership agreement.

E. Order for Instruction on Signing a Partnership Agreement filed March 15, 1944. The Court authorized and instructed the guardian to sign the partnership agreement and approved the form of the partnership agreement.

F. Order Appointing Guardian of Minors filed February 7, 1944. The Court appointed Elgin R. Parker as guardian for the estates of the four children conditional upon his giving Surety Company bonds for \$23,000.00 for each guardianship estate.

G. Letters of Guardianship. This document shows that Elgin R. Parker was appointed guardian for the estates of the four children and he took his oath of office.

H. Inventory and Appraisement. Elgin R. Parker filed an inventory for each guardianship estate and the appraiser appointed by the Court

found the value for each guardianship estate to be \$24,745.98, being one-eighth of the net worth shown on the balance sheet attached to the deed introduced by the plaintiffs as Exhibit 2.

I. First Annual Account of Guardian filed May 3, 1945. Attached to the First Annual Account was a report of the activities of the Southern Heater Company for the year ended October 31, 1944, made by Meyer Pritkin & Company, Certified Public Accountants. The account showed an opening balance for each estate of \$24,745.98 and a closing balance after adding income and deducting the withdrawals of \$41,385.42 for each guardianship estate.

J. Decree Settling First Annual Account of Guardian and Ordering Payment of Attorneys' Fees filed August 19, 1945. The decree approved the First Annual Account and authorized the guardian to pay \$125.00 attorneys' fees as prayed.

K. Order Settling Fifth Annual Account of Guardian and Order for Payment of Attorneys' Fees and Order Instructing Guardian on Investment of Funds of Wards filed November 22, 1948.

In the Superior Court of the State of California,
In and for the County of Orange

No. A-11,392

In the Matter of the Guardianship of FLO DIAN
PARKER, PATRICIA LEE PARKER,
ROWLAND TIBBETTS PARKER and
ARTHUR ELGIN PARKER,
Minors.

ORDER SETTLING FIFTH ANNUAL AC-
COUNT OF GUARDIAN AND ORDER
FOR PAYMENT OF ATTORNEYS' FEES
AND ORDER INSTRUCTING GUARDIAN
ON INVESTMENT OF FUNDS OF WARDS

Comes now Elgin R. Parker, guardian of the guardianship estates of Flo Dian Parker, Patricia Lee Parker, Rowland Tibbetts Parker and Arthur Elgin Parker, minors, by Melvin D. Wilson, Attorney, and presents to the Court for settlement his Fifth Annual Account showing charges in favor of each of said guardianship estates amounting to \$88,639.92 and claiming credits amounting to \$300.00, leaving a balance of \$88,339.92 in his hands belonging to each of said guardianship estates, subject to unsettled claims of Elgin R. Parker and Flo Parker for adjustment on account of federal and state income taxes for the years 1944, 1945 and 1946; that he now proves to the satisfaction of the Court that said Account was filed on or about the 15th day of November, 1948; that the Clerk thereupon appointed the 26th day of November, 1948, as the time for settlement thereof; that notice of the

time and place of said settlement has been duly given as required by law and that no person appearing to except to or contest said Account, the Court, after hearing evidence, finds said Account correct and that the attorneys' fees set forth in the accompanying report are justly due and payable out of said estate.

It Is Therefore Ordered, Adjudged and Decreed by the Court that said Account be in all respects approved, allowed and settled and that Elgin R. Parker forthwith, out of the moneys in his hands belonging to said estates, pay to Melvin D. Wilson, Esq., the sum of \$200.00.

The Court Further Orders that Elgin R. Parker, as guardian of the above-entitled guardianship estates, be hereby authorized and instructed to participate in taking the following steps:

1. To cause the dissolution of the partnership known as Southern Heater Company;
2. To exchange the interest of each guardianship estate in said partnership for twelve and one-half per cent ($12\frac{1}{2}\%$) of the capital stocks held by said partnership and the pro rata shares of notes issued by Elgin R. Parker and Flo Parker, payable to the partnership, and assigned by the partnership to said guardianship estates.

Dated this 7 day of December, 1948.

/s/ RAYMOND THOMPSON,
Judge of the Superior Court.

[Endorsed]: Filed Dec. 7, 1948.

Exhibit 4. Partnership Agreement.

PLAINTIFFS' EXHIBIT No. 4

Articles of Copartnership

These Articles of Co-Partnership, made and entered into as of the first day of November, 1943, by and between Elgin R. Parker, Flo Parker, and Elgin R. Parker, as guardian of the properties of Flo Dian Parker, Patricia Lee Parker, Rowland Tibbetts Parker, and Arthur Elgin Parker, minors, Witnesseth:

1. The parties hereto have agreed, and do hereby agree, to become partners together, under the fictitious firm name and style of Southern Heater Company. The said partnership will also use the firm names of Merit Heater Company, United States Heater Company, Crown Heater Company, Southern Galvanizing Company, and Bessemer Engineering Company.

2. Said partnership shall carry on and conduct a business of manufacturing and selling water heaters; and shall carry on any other business in connection with the foregoing or in furtherance of the partnership purposes, and shall engage in any business or transaction whatsoever, which the partners may from time to time agree upon, to the same extent as natural persons might or could do.

3. The place of business of said partnership is 133 East Palmer Street, Compton, California, which

place may be changed from time to time by agreement of the partners.

4. Said partnership shall continue for the common and mutual benefit and advantage of the parties herto, subject to the terms and conditions of this agreement, until such time as the same shall be dissolved by any of the partners or by operation of law.

5. (a) The partners have contributed, and do hereby contribute, and by these presents do assign, transfer and set over and deliver unto the partnership, for partnership purposes, all of the assets of that certain manufacturing water heater business heretofore operated by Elgin R. Parker and Flo Parker, as co-partners under the fictitious firm names of Southern Heater Company, Merit Heater Company, United States Heater Company, Crown Heater Company, Southern Galvanizing Company, and Bessemer Engineering Company. Said assets, contributed to the partnership, as aforesaid, are now owned by the parties hereto in the following proportions: Elgin R. Parker 25 per cent, Flo Parker 25 per cent, Flo Dian Parker $12\frac{1}{2}$ per cent, Patricia Lee Parker $12\frac{1}{2}$ per cent, Rowland Tibbets Parker $12\frac{1}{2}$ per cent, and Arthur Elgin Parker $12\frac{1}{2}$ per cent; the last four named partners operating through their guardian, Elgin R. Parker. It is hereby declared that henceforth all of said assets shall belong to the partnership hereby created, but the respective interest of the parties hereto in the partnership and the capital, income, profits and pro-

ceeds thereof and therefrom, shall be the sole and separate property of each of said parties free from any community or other interest on the part of the other parties.

(b) The transfer of said assets to the partnership, as aforesaid, is subject to liabilities, which liabilities the partnership does hereby assume. An itemized list of said assets and of the known liabilities, is contained in the balance sheet as of October 31, 1943, hereinafter annexed and made a part hereof. It is understood that the assets are subject to liabilities not shown in the attached balance sheet: For renegotiation, such Federal and State income taxes on Flo Parker and Elgin R. Parker for the years 1941, 1942 and 1943, as may finally be determined to be due, and for such other liabilities as may arise and be determined to be a liability of the predecessor business, or of Elgin R. Parker or of Flo Parker, as of October 31, 1943.

6. The capital of the partnership shall consist of:

(a) The assets listed on said balance sheet at October 31, 1943, hereunto annexed;

(b) Any and all other or further contributions which the partners, or any of them, may hereafter make; and

(c) All machinery, equipment, contracts, good will, property and assets of every kind, which the partnership may hereafter in any manner acquire.

7. (a) The partners shall have interests in and to the capital of the partnership in the following proportions: Elgin R. Parker 25 per cent, Flo Parker 25 per cent, Flo Dian Parker $12\frac{1}{2}$ per cent, Patricia Lee Parker $12\frac{1}{2}$ per cent, Rowland Tibbetts Parker $12\frac{1}{2}$ per cent, and Arthur Elgin Parker $12\frac{1}{2}$ per cent, in and to the partnership capital.

(b) Inasmuch as Elgin R. Parker proposes to devote a greater amount of his time to the partnership affairs than do the other partners, and will, therefore, render a greater amount of service thereto, it is agreed that all net income or net profits derived from the partnership shall belong to the parties hereto in the following proportions: After deducting the salary provided for in paragraph 10 hereof, 25 per cent to Elgin R. Parker, 25 per cent to Flo Parker, $12\frac{1}{2}$ per cent to Flo Dian Parker, $12\frac{1}{2}$ per cent to Patricia Lee Parker, $12\frac{1}{2}$ per cent to Rowland Tibbetts Parker, and $12\frac{1}{2}$ per cent to Arthur Elgin Parker.

8. The net income and net profits of the partnership shall be paid and distributed to the parties hereto in the proportion above set forth from time to time as the partners may determine, and any and all losses or expenses incurred in connection with the partnership business and affairs shall be borne and paid by the partners in the same proportions as the net income and net profits are divided, that is to say, 25 per cent to Elgin R. Parker, 25

per cent to Flo Parker, $12\frac{1}{2}$ to Flo Dian Parker, $12\frac{1}{2}$ per cent to Patricia Lee Parker, $12\frac{1}{2}$ per cent to Rowland Tibbetts Parker, and $12\frac{1}{2}$ per cent to Arthur Elgin Parker.

9. The net income and net profits of the partnership shall be determined and computed in accordance with the standard and prevailing accounting practices, with the usual deductions for operating expenses, depreciation, taxes and other items, as approved by a certified public accountant or accountants selected by the partners.

10. It is understood and agreed that the partners may from time to time authorize the payment to any of the partners, in addition to their share of the net profits, of salaries, bonuses, or other compensation for services rendered to the partnership, in which event such salaries, bonuses or other compensation shall be charged to the operating expenses of the partnership. Until further agreement, Elgin R. Parker shall receive a salary of Twelve Thousand Dollars (\$12,000) per year.

11. At all times during the continuance of said partnership, each of the parties hereto shall give a sufficient amount of his or her time, attention and attendance to the conduct of the business of the partnership as shall be necessary and proper for the efficient operation of said business and the carrying out of the purposes of the partnership; and each of the partners will at all times, to the utmost of his skill and power, exert his best efforts for the joint interest, benefit and advantage of the

partners and the business of the partnership. All partners shall be kept fully advised with respect to the partnership business and affairs.

12. There shall at all times be kept during the continuance of said partnership just and true books of account, wherein shall be entered a record of all moneys received and disbursed and all other transactions in connection with the partnership business; and said books shall be used in common by the partners, and any of them shall have access thereto at any time without interruption or hindrance from the others. The books of the partnership shall be balance from time to time as the partners may agree, in such manner as to exhibit the true state and condition of the affairs of the partnership. None of the partners shall receive or pay out any money or engage in any transaction on behalf of the partnership unless the same shall be immediately entered in the books and accounts of the partnership.

13. None of the partners shall have the right to sell, transfer, assign or convey his or her interest in the partnership or its business, property or assets, or any part thereof, without giving the other partners the prior right and option to purchase such interest, at the same price and upon the same terms and conditions, for a period of ninety (90) days after notice in writing to the other partners of his or her intention to make such sale or transfer. Such notice shall be given in writing by the part-

ner desiring to sell, and shall specify the price the selling partner is to receive for his or her interest, and the terms of payment thereof. The remaining partners shall thereupon have the right and option for a period of ninety (90) days from the giving of said notice, to purchase the interest of the partners desiring to sell at the same price and upon the same terms, which option shall be exercised by notice in writing to the partner desiring to sell. The remaining partners may participate in this right to purchase in their respective proportions. Should one or more partners not desire to participate in the purchase of additional partnership interest, then the other remaining partners shall have the right to participate in the purchase, in their respective proportions.

14. Any notice given hereunder may be given by personal delivery to parties to whom the same is directed, or same may be forwarded to such parties by registered mail at his or her last known address. In case of service by registered mail, such notice shall be deposited in the United States mail in the County of Los Angeles, State of California, and notice shall be deemed to have been given on the date of mailing.

15. Upon any dissolution of said partnership, a full and final accounting of the assets and property of the partnership shall be taken, and the same shall, as soon as practicable, be liquidated, and the debts due the partnership collected and

the proceeds applied first to the discharge of the liabilities of the partnership and the expenses of liquidation, and the surplus, if any, shall be divided between the partners, their heirs, executors or administrators in proportion to their respective interests in the capital of the partnership.

16. This agreement shall bind and inure to the benefit of the respective heirs, executors and administrators of the parties hereto. The masculine gender, when used herein shall be deemed to include the feminine, and the singular shall include the plural and the plural the singular.

Executed as of the day and year first above written.

/s ELGIN R. PARKER,

/s/ FLO PARKER.

FLO DIAN PARKER,

By /s/ ELGIN R. PARKER,

Guardian.

PATRICIA LEE PARKER,

By /s/ ELGIN R. PARKER,

Guardian.

ROWLAND TIBBETTS

PARKER,

By /s/ ELGIN R. PARKER,

Guardian.

ARTHUR ELGIN PARKER,

By /s/ ELGIN R. PARKER,

Guardian.

State of California,
County of Los Angeles—ss.

On this 25th day of February, 1944, before me, a Notary Public in and for said County and State, personally appeared Elgin R. Parker, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ CAPITOLA FIERKE,
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires Sept. 28, 1946.

State of California,
County of Los Angeles—ss.

On this 25th day of February, 1944, before me, a Notary Public in and for said County and State, personally appeared Flo Parker, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

CAPITOLA FIERKE,
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires Sept. 28, 1946.

State of California,
County of Los Angeles—ss.

On this 25th day of February, 1944, before me, a Notary Public in and for said County and State, personally appeared Elgin R. Parker, as guardian of the estates of Flo Dian Parker, Patricia Lee Parker, Rowland Tibbetts Parker, and Arthur Elgin Parker, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ CAPITOLA FIERKE,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Sept. 28, 1946.

[Endorsed]: Filed Jan. 10, 1950.

Exhibit 5. Sales Tax Permit. The new partnership consisting of the plaintiffs and the four children received a California Sales Tax Seller's Permit under the name of Southern Heater Company showing the initials of the six partners, dated November 1, 1943.

Exhibit 6. This consisted of a notice to the new partnership, consisting of the plaintiffs and the children, of the Employer's Identification Number un-

der Chapter 9 of the Internal Revenue Code.

Exhibit 7. This exhibit showed that a new partnership consisting of the plaintiffs and the four children filed a Certificate of Fictitious Firm Name, Southern Heater Company, and the said certificate was duly published and filed in accordance with the law.

Exhibit 8. This was a copy of one of the four surety bonds filed by the guardian in the four partnership estates, each in the amount of \$23,000.00.

Exhibit 9. First Amendment to Partnership Agreement. This amendment simply provided that the salary which Elgin R. Parker was to receive from the partnership was to be the community property of himself and wife.

Exhibit 10. Second Amendment to Partnership Agreement. This agreement dated May 24, 1946, recited that since the partnership had transferred its active business to two corporations in exchange for their stocks and now that this partnership merely held the stocks and the real estate, the salary of Elgin R. Parker provided for in the original agreement was reduced to \$200.00 per month, said salary to be paid by the partnership.

Exhibit 12. Agreement to Dissolve Partnership, with balance sheet attached thereto.

PLAINTIFFS' EXHIBIT No. 12

Agreement for Dissolution of Partnership

This Agreement made this 30th day of November, 1948, entered into between Elgin R. Parker, Flo Parker, and Elgin R. Parker, as guardian of the properties of Flo Dian Parker, Patricia Lee Parker, Rowland Tibbetts Parker and Arthur Elgin Parker,

Witnesseth:

Whereas, as of the 1st day of November, 1943, the parties entered into Articles of Co-partnership to operate a business known as Southern Heater Company and also known as Merit Heater Company, United States Heater Company, Crown Heater Company, Southern Galvanizing Company, Bessemer Engineering Company and American Control Company; and

Whereas, it is deemed to the best interests of the parties hereto that said partnership be dissolved inasmuch as the active operating business has been transferred to various corporations and the partnership now merely holds stock in said corporations and notes of the partners.

Now, Therefore, be it understood and agreed as follows:

1. That the partnership known by the above names shall be dissolved as of November 1, 1948.

2. That the assets and liabilities of the partnership as of October 31, 1948, are as shown on Exhibit A attached hereto.

3. That the interests of the partners in the partnership as of November 1, 1948, were as follows:

Elgin R. Parker.....	25%
Flo Parker	25%
Flo Dian Parker	12½%
Patricia Lee Parker.....	12½%
Rowland Tibbetts Parker.....	12½%
Arthur Elgin Parker.....	12½%

It is understood that the stock of Southern Heater Corporation, American Control Corporation, Parker Realty Company and Radiantair Control Corporation will be divided among the partners in relation to their interests in the partnership.

4. It is further agreed that the notes receivable from partners, owned by the partnership, will be distributed to the partners as follows:

(a) To Elgin R. Parker:

Note signed by E. R. Parker for \$26,217.92;

Note signed by Flo Parker for \$27,464.71;

(b) To Flo Parker:

Note signed by E. R. Parker for \$26,217.92;

Note signed by Flo Parker for \$27,464.71;

(c) To Flo Dian Parker:

Note signed by E. R. Parker for \$13,108.95;

Note signed by Flo Parker for \$13,732.35;

(d) To Patricia Lee Parker:

Note signed by E. R. Parker for \$13,108.95;

Note signed by Flo Parker for \$13,732.35;

(e) To Rowland Tibbetts Parker:

Note signed by E. R. Parker for \$13,108.96;

Note signed by Flo Parker for \$13,732.35;

(f) To Arthur Elgin Parker:

Note signed by E. R. Parker for \$13,108.96;

Note signed by Flo Parker for \$13,732.35.

5. It is understood that the remaining assets in the partnership will be divided among the partners in proportion to their interests in the firm and that each will assume and be subject to a pro rata share of the liabilities of the partnership as shown by Exhibit A.

6. It is agreed that Elgin R. Parker, as one of the partners, shall assign, on behalf of the partnership, the notes, stocks and other assets to the respective partners and that this partnership will cease to exist as of November 1, 1948.

7. It is agreed that notice of the dissolution of the partnership will be published in the Los Angeles Daily Journal and that a notice of the dissolution will be filed with the County Clerk of Los Angeles County, California.

Witness our hands and seals this 30th day of November, 1948.

/s/ ELGIN R. PARKER,

/s/ FLO PARKER,

/s/ ELGIN R. PARKER,

As Guardian of Flo Dian Parker, Patricia Lee Parker, Rowland Tibbetts Parker and Arthur Elgin Parker.

EXHIBIT "A"

Southern Heater Company
Statement of Assets and Liabilities
As at October 31, 1948

Assets

Cash in Bank	\$ 1,328.88
Notes Receivable from	
Mr. and Mrs. Parker	214,730.48
Accounts Receivable—Sundry	258.21
Investments in Stocks (At Cost) :	
Southern Heater Corporation	340,222.76
Parker Realty Corporation	58,000.00
American Control Corporation	52,000.00
Radiantair Control Corporation	15,000.00
	<hr/>
Total Assets	\$681,540.33

Liabilities

Accounts Payable—Sundry	\$ 4,820.96
	<hr/>
Partnership Capital	\$676,719.37
	<hr/> <hr/>

Detail of Partners' Accounts:

E. R. Parker	\$169,179.83
Flo Parker	169,179.84
Arthur Parker	84,589.92
Patricia Lee Parker	84,589.92
Flo Dian Parker	84,589.93
Rowland T. Parker	84,589.93
	<hr/>
	\$676,719.37
	<hr/> <hr/>

[Endorsed]: Filed Jan. 10, 1950.

Exhibit 13. Notice of Dissolution of Partnership. A notice of the dissolution of the partnership as of November 1, 1948, was published in March, 1949, in the Los Angeles Daily Journal as shown by the verified report of the publishing company.

Exhibit 14. This exhibit comprised seven 1944 Federal Income Tax returns, six for the plaintiffs and their four children and one for the partnership. The partnership return showed a net income after paying Elgin R. Parker's salary of \$12,000.00 of \$252,535.84. It showed that each child was entitled to \$31,566.98 and that each was taxable on that and each parent was taxable on \$63,133.95 plus \$6,000.00 salary from the partnership. The individual returns reported their shares of the partnership income as indicated above.

Exhibit 15. Summary of Partnership Capital Accounts.

PLAINTIFF'S EXHIBIT NO. 15

Southern Heater Company
Analysis of Partners' Capital Accounts
November 1, 1943 to October 31, 1948

	E. R. Parker, Guardian						
	Total	E. R. Parker	Flo Parker	Arthur E. Parker	Patricia Lee Parker	Flo Dian Parker	Rowland T. Parker
Beginning Capital—November 1, 1943.....	\$197,967.80	\$ 49,491.94	\$ 49,491.94	\$24,745.98	\$24,745.98	\$24,745.98	\$24,745.98
November 1, 1943 to October 31, 1944							
Add: Net Profit	252,535.82	63,133.95	63,133.95	31,566.98	31,566.98	31,566.98	31,566.98
	450,503.62	112,625.89	112,625.89	56,312.96	56,312.96	56,312.96	56,312.96
Less: Withdrawals for Income Tax	130,263.12	35,506.48	35,506.48	14,812.54	14,812.54	14,812.54	14,812.54
Other Withdrawals	3,506.14	980.70	2,065.44	115.00	115.00	115.00	115.00
	133,769.26	36,487.18	37,571.92	14,927.54	14,927.54	14,927.54	14,927.54
Capital—October 31, 1944	316,734.36	76,138.71	75,053.97	41,385.42	41,385.42	41,385.42	41,385.42
November 1, 1944 to October 31, 1945							
Add: Net Profit	217,646.15	54,411.54	54,411.53	27,205.77	27,205.77	27,205.77	27,205.77
	534,380.51	130,550.25	129,465.50	68,591.19	68,591.19	68,591.19	68,591.19
Less: Withdrawals for Income Tax	118,594.94	39,641.46	37,260.48	10,423.25	10,423.25	10,423.25	10,423.25
Other Withdrawals	15,486.70	243.35	243.35	3,750.00	3,750.00	3,750.00	3,750.00
	134,081.64	39,884.81	37,503.83	14,173.25	14,173.25	14,173.25	14,173.25
Capital—October 31, 1945	400,298.87	90,665.44	91,961.67	54,417.94	54,417.94	54,417.94	54,417.94
November 1, 1945 to October 31, 1946							
Add: Net Profit	300,783.48	75,195.86	75,195.86	37,597.94	37,597.94	37,597.94	37,597.94
	701,082.35	165,861.30	167,157.53	92,015.88	92,015.88	92,015.88	92,015.88
Less: Withdrawals for Income Tax	111,733.37	50,678.44	50,517.17	2,634.44	2,634.44	2,634.44	2,634.44
Other Withdrawals	9,166.30	1,226.40	7,582.90	89.25	89.25	89.25	89.25
	120,899.67	51,904.84	58,100.07	2,723.69	2,723.69	2,723.69	2,723.69
Capital—October 31, 1946	580,182.68	113,956.46	109,057.46	89,292.19	89,292.19	89,292.19	89,292.19
November 1, 1946 to October 31, 1947							
Add: Net Profit	24,296.66	6,074.17	6,074.17	3,037.08	3,037.08	3,037.08	3,037.08
	604,479.34	120,030.63	115,131.63	92,329.27	92,329.27	92,329.27	92,329.27
Less: Withdrawals for Income Tax	111,590.26	22,500.53	22,500.67	16,647.27	16,647.27	16,647.26	16,647.26
Other Withdrawals	19,503.50	9,817.75	10,042.75	89.25	89.25	89.25	89.25
	92,086.76	12,682.78	12,457.92	16,736.52	16,736.52	16,736.51	16,736.51
Capital—October 31, 1947	512,392.58	107,347.85	102,673.71	75,592.75	75,592.75	75,592.76	75,592.76
Payment on Tax Deficiency	64,066.72	31,934.00	32,132.72				
Adjusted Capital—October 31, 1947	448,325.86	75,413.85	70,540.99	75,592.75	75,592.75	75,592.76	75,592.76
November 1, 1947 to October 31, 1948							
Add: Net Profit	75,229.12	18,897.28	18,807.28	9,403.64	9,403.64	9,403.64	9,403.64
	523,554.98	94,221.13	89,348.27	84,996.39	84,996.39	84,996.40	84,996.40
Less: Withdrawals for Income Tax	4,818.05	768.07	882.37	695.90	695.91	695.90	695.90
Other Withdrawals	56,748.04	29,144.88	29,144.88	289.13	289.13	289.13	289.13
	61,566.09	29,912.95	30,027.25	406.47	406.48	406.47	406.47
Capital—October 31, 1948	461,988.89	64,308.18	59,321.02	84,589.92	84,589.91	84,589.93	84,589.93
(Before Issuance of Notes)	461,988.89	64,308.18	59,321.02	84,589.92	84,589.91	84,589.93	84,589.93
Add: Partners' Notes	214,730.48	104,871.66	109,858.82				
Capital—October 31, 1948	676,719.37	169,179.84	169,179.84	84,589.92	84,589.91	84,589.93	84,589.93
Distribution to Partners—October 31, 1948							
(Per Schedule Attached)	676,719.37	169,179.84	169,179.84	84,589.92	84,589.91	84,589.93	84,589.93
Balance.....							

[Italicized figures are shown in red.]

E. R. Parker, Guardian
Disbursements From Guardianship Funds—Other Than Income Taxes
November 1, 1943 to October 31, 1948

	<u>Total</u>	<u>Arthur E. Parker</u>	<u>Patricia Lee Parker</u>	<u>Flo Dian Parker</u>	<u>Rowland T. Parker</u>
November 1, 1943 to October 31, 1944					
Guardian Bond	\$ 460.00	\$ 115.00	\$ 115.00	\$ 115.00	\$ 115.00
November 1, 1944 to October 31, 1945					
Series E Bonds	15,000.00	3,750.00	3,750.00	3,750.00	3,750.00
November 1, 1945 to October 31, 1946					
Guardian Bond	357.00	89.25	89.25	89.25	89.25
November 1, 1946 to October 31, 1947					
Guardian Bond	357.00	89.25	89.25	89.25	89.25
November 1, 1947 to October 31, 1948					
Partnership Adjustments:					
Adjustment of 10/31/47					
Reserve for Service Charges	<i>1,584.00</i>	<i>396.00</i>	<i>396.00</i>	<i>396.00</i>	<i>396.00</i>
Return of Edison Co. Deposit	<i>332.84</i>	<i>83.21</i>	<i>83.21</i>	<i>83.21</i>	<i>83.21</i>
Guardian Bond	357.00	89.25	89.25	89.25	89.25
Legal Fees	402.12	100.53	100.53	100.53	100.53
	<u>\$15,016.28</u>	<u>\$3,754.07</u>	<u>\$3,754.07</u>	<u>\$3,754.07</u>	<u>\$3,754.07</u>

[Italicized figures shown in red.]

Southern Heater Company
Analysis of Distribution of Net Assets
Dissolution as of October 31, 1948

	Total	E. R. Parker	Flo Parker	E. R. Parker, Guardian			
				Patricia Arthur E. Parker	Lee Parker	Flo Dian Parker	Rowland T. Parker
Cash in Bank	\$ 1,328.88	\$ 332.22	\$ 332.22	\$ 166.11	\$ 166.11	\$ 166.11	\$ 166.11
Accounts Receivable—Employees	77.16	19.29	19.29	9.65	9.64	9.64	9.65
Notes Receivable From Partners	214,730.48	53,682.62	53,682.62	26,841.31	26,841.31	26,841.31	26,841.31
Investment in Radiantair, Inc.	15,000.00	3,750.00	3,750.00	1,875.00	1,875.00	1,875.00	1,875.00
Investment—Southern Heater Corporation	340,222.76	85,055.69	85,055.69	42,527.84	42,527.84	42,527.85	42,527.85
Investment—American Control Corporation	52,000.00	13,000.00	13,000.00	6,500.00	6,500.00	6,500.00	6,500.00
Investment—Parker Realty Co.	58,000.00	14,500.00	14,500.00	7,250.00	7,250.00	7,250.00	7,250.00
Tax Refund Receivable	181.05	45.26	45.26	22.63	22.63	22.64	22.63
Customers' Credit Balances	<i>4,820.96</i>	<i>1,205.24</i>	<i>1,205.24</i>	<i>602.62</i>	<i>602.62</i>	<i>602.62</i>	<i>602.62</i>
Partnership Capital	\$676,719.37	\$169,179.84	\$169,179.84	\$84,589.92	\$84,589.91	\$84,589.93	\$84,589.93

[Italicized figures are shown in red.]

Filed Jan. 10, 1950.

Exhibit 16. Application for Authority to Compromise Claims filed April 11, 1947.

PLAINTIFFS' EXHIBIT No. 16.

In the Superior Court of the State of California
In and for the County of Orange

No. A-11392

In the Matter of the Guardianship of

FLO DIAN PARKER, PATRICIA LEE
PARKER, ROWLAND TIBBETTS
PARKER and ARTHUR ELGIN PARKER,
Minors.

APPLICATION FOR AUTHORITY TO
COMPROMISE CLAIMS

To the Superior Court of the State of California
In and for the County of Orange:

Petitioner, Elgin R. Parker, represents as follows:

With respect to the application for authority to compromise claims for the year ended October 31, 1944, heretofore filed by your petitioner in August of 1946, the Court is advised that Elgin R. Parker and Flo Parker have decided to pay the additional income taxes proposed by the Commissioner of Internal Revenue for the year 1944, to file claims for refund and to prosecute the same in the Federal District Court in Los Angeles.

The Commissioner of Internal Revenue has proposed additional Federal income taxes for the year ended October 31, 1944, against the parties as follows:

Elgin R. Parker	\$55,589.70
Flo Parker	55,562.19

The Commissioner has offered to refund to each guardianship estate the taxes paid by it for the year 1944 in the amount of \$13,986.09 each.

Elgin R. Parker and Flo Parker would like to pay said additional taxes in part by cash and in part by offsetting the refunds due to the guardianship estates against the additional taxes due from the parents. This procedure is satisfactory with the Commissioner of Internal Revenue but your petitioner would like approval of the Court therefor.

Your petitioner prays approval of the following steps and procedures:

1. That he as guardian be authorized by this Court to sign an offset statement with Elgin R. Parker and Flo Parker and the Commissioner of Internal Revenue whereby the refunds due to the guardianship estates for the year 1944 may be credited against the additional taxes claimed by the Commissioner of Internal Revenue to be due from Elgin R. Parker and Flo Parker for the year 1944.

2. That in the event Elgin R. Parker and Flo Parker eventually lose their litigation with the

Commissioner of Internal Revenue with respect to the incidence of the tax on the income of this partnership that Elgin R. Parker and Flo Parker be permitted to keep and retain said refunds in at least part settlement of their claims against the guardianship estate on account of income taxes.

3. In the event that Elgin R. Parker and Flo Parker eventually win their litigation with the Commissioner of Internal Revenue with respect to the incidence of tax on the income of this partnership for the year 1944 that Elgin R. Parker and Flo Parker pay to these guardianship estates the said refunds of \$13,986.09 each, plus any interest benefits that have been obtained by said Elgin R. Parker and Flo Parker and that this procedure be in complete settlement of said claims by said Elgin R. Parker and Flo Parker against said guardianship.

4. That in the event Elgin R. Parker and Flo Parker eventually lose their litigation with the Commissioner of Internal Revenue respecting income tax on the income of this partnership for the year 1944 that the matter of the claims by Elgin R. Parker and Flo Parker against these guardianship estates on account of income taxes for that year be further considered and, if necessary, adjudicated.

5. That arrangements similar to the above be made with respect to California income taxes in the event that the Franchise Tax Commissioner of

the State of California makes determinations similar to those made by the Commissioner of Internal Revenue for the year 1944.

Dated April 7, 1947.

/s/ ELGIN R. PARKER,
Petitioner.

/s/ MELVIN D. WILSON,
Attorney for Petitioner.

State of California,
County of Los Angeles—ss.

Elgin R. Parker, being first duly sworn, on oath deposes and says that he is the petitioner in the above and foregoing Application for Authority to Compromise Claims; that he has read said application and knows the contents thereof and that the facts therein stated are true as he verily believes.

/s/ ELGIN R. PARKER.

Subscribed and Sworn to before me this 7th day of April, 1947.

[Seal] /s/ CAPITOLA FIERKE,
Notary Public in and for Said County and State.

My Commission expires Oct. 30, 1950.

[Endorsed]: Filed April 11, 1947.

Exhibit 16. Order for Authority to Compromise
Claims filed April 11, 1947.

In the Superior Court of the State of California
In and for the County of Orange

No. A-11392

In the Matter of the Guardianship of

FLO DIAN PARKER, PATRICIA LEE
PARKER, ROWLAND TIBBETTS
PARKER and ARHUR ELGIN PARKER,
Minors.

ORDER FOR AUTHORITY TO COMPROMISE
CLAIMS

The petition of Elgin R. Parker, as guardian of the estates of Flo Dian Parker, Patricia Lee Parker, Rowland Tibbetts Parker and Arthur Elgin Parker, minors, for authority to compromise claims against the guardian coming on regularly to be heard this 25th day of April, 1947, and the Court, after examining the petition and hearing the evidence, finds that notice of the time and place of said hearing has been duly given as required by law and that no persons appearing to except to or contest said petition, and finds that all the allegations of said petition are true and that the

conditional or tentative compromise of claims prayed for in said petition is equitable and proper and correct,

It is, therefore, ordered by the Court that the guardian of each of said guardianship estates is hereby authorized as follows:

1. That he as guardian is hereby authorized by this Court to sign an offset statement with Elgin R. Parker and Flo Parker and the Commissioner of Internal Revenue whereby the refunds due to the guardianship estates for the year 1944 may be credited against the additional taxes claimed by the Commissioner of Internal Revenue to be due from Elgin R. Parker and Flo Parker for the year 1944.

2. That in the event Elgin R. Parker and Flo Parker eventually lose their litigation with the Commissioner of Internal Revenue with respect to the incidence of the tax on the income of this partnership that Elgin R. Parker and Flo Parker be permitted to keep and retain said refunds in at least part settlement of their claims against the guardianship estate on account of income taxes, and that the claims of Elgin R. Parker and Flo Parker be further considered, and if necessary, adjudicated.

3. In the event that Elgin R. Parker and Flo Parker eventually win their litigation with the Commissioner of Internal Revenue with respect to the incidence of tax on the income of this partnership

for the year 1944 that Elgin R. Parker and Flo Parker pay to these guardianship estates the said refunds of \$13,986.09 each, plus any interest benefits that have been obtained by said Elgin R. Parker and Flo Parker and that this procedure be in complete settlement of said claims by said Elgin R. Parker and Flo Parker against said guardianship.

4. That arrangements similar to the above be made with respect to California income taxes in the event that the Franchise Tax Commissioner of the State of California makes determinations similar to those made by the Commissioner of Internal Revenue for the year 1944.

Dated: 4/25/47.

/s/ [Indistinguishable]

Judge of the Superior Court.

[Endorsed]: Filed April 25, 1947.

The defendant introduced into evidence Exhibits which are printed or condensed as follows:

Defendant's Exhibit A. Documents in the Guardianship Proceedings.

Defendant's Exhibit A comprised 28 documents filed in the guardianship proceedings. Documents 1, 2, 3, 5, 6, 8, 10, 11, 20, 23, and 28 were filed by plaintiff and are described in Plaintiffs' Exhibits, above.

Documents 4, 7, 9, 15, 18, and 25 are copies of

orders dispensing with notice or orders prescribing notice of various hearings or the like.

Defendant's Exhibit A included documents not covered above which are condensed or included in full, as follows:

1. Second Annual Account of Guardian and Petition for Allowance of Attorneys' Fees filed January 19, 1946.

2. Decree Settling Second Annual Account of Guardian and Ordering Payment of Attorneys' Fees filed February 1, 1946.

3. Application for Instruction on Investment of Funds of Wards filed April 5, 1946. The application recited that each guardianship estate had a one-eighth interest in the partnership known as Southern Heater Company, and each interest had a book value of \$54,417.94. In addition, each guardianship estate had Series E bonds costing \$3,750.00 making a total for each estate of \$58,167.94.

The application requested authority for the guardian to cause the partnership, Southern Heater Company, to transfer personal property such as machine and equipment inventory, cash, to a corporation about to be formed to be known as Southern Heater Corporation. The cost of the assets to be transferred was \$304,000.00 and the partnership was to receive from Southern Heater Corporation all of its outstanding stock of the par value of \$304,000.00. Said corporation would carry on the business of manufacturing and selling of water

heaters and other household appliances. It would leave from the partnership such land and buildings as it needed and would employ as officers Elgin R. Parker, his wife, and other employees of the partnership.

The application also requested authority to transfer from the partnership personal property having a cost of \$48,000.00 to a corporation about to be formed called The American Control Corporation which would issue out of its outstanding stock of a par value of \$48,000.00 to the partnership. This corporation would manufacture and sell automatic controls and brass specialties and its officers and directors would also be Elgin R. Parker and his wife and other employees of the partnership.

The application recited various business reasons for the proposed incorporation of parts of the partnership business.

4. Order Instructing Guardian on Investment of Guardianship Funds, filed April 5, 1946. The Court issued its order instructing the guardian to transact the matters covered in the application.

5. The defendant offered in evidence Application for Authority to Compromise Claims which was filed in the Probate Court August 27, 1946. The plaintiffs objected on the ground that there were some statements therein signed by Elgin R. Parker, the guardian, as to the status of the law on family partnerships and that this was a matter of opinion of law and could not be taken as an admission of any kind against him. The document was admitted

over the plaintiffs' objection and sent out to the jury room with the Jury along with all the other documents in the case.

In the Superior Court of the State of California
In and for the County of Orange

No. A-11392

In the Matter of the Guardianship of

FLO DIAN PARKER, PATRICIA LEE
PARKER, ROWLAND TIBBETTS
PARKER and ARTHUR ELGIN PARKER,
Minors.

APPLICATION FOR AUTHORITY TO
COMPROMISE CLAIMS

To the Superior Court of the State of California
In and for the County of Orange:

Petitioner, Elgin R. Parker, represents as follows:

That he is the duly appointed and acting guardian of the estates of Flo Dian Parker, Patricia Lee Parker, Rowland Tibbetts Parker and Arthur Elgin Parker, minors, having been appointed on the 31st day of December, 1943, and having posted the proper surety bond required by the order of the Court.

Each guardianship estate consists of a 12½% interest in and to the business and assets of a partnership known as Southern Heater Company and Series "E" United States Government Bonds in the face value of \$3,750.00. As of October 31, 1945, the interest of each guardianship estate in the capital of the partnership amounted to \$54,417.94 book value. The partnership assets consist of all of the stock of Southern Heater Corporation, a California corporation, and all of the stock of American Control Corporation, a California corporation, real estate, bank accounts and minor miscellaneous assets.

As of October 31, 1943, your petitioner and his wife, Flo Parker, were equal partners owning the business known as Southern Heater Company. On that date each of them gave to each of their four children named herein a 6¼% interest in and to the assets and business of said Southern Heater Company, a co-partnership. After the gift, with the approval of this Court, the guardian entered into a partnership agreement wherein the four children and their parents became partners under the firm name of Southern Heater Company. At the time of the gift and of the creation of the partnership it was expected and anticipated that each of the partners, including the four minors, would be taxable upon their shares of the partnership income. Each of the six persons filed Federal and State income tax returns and paid the tax shown on their income from the partnership.

The Commissioner of Internal Revenue through

the Internal Revenue Agent in Charge at Los Angeles, California, has made an examination of the income tax returns of the partnership and of the six partners for the period ending October 31, 1944, and has rendered a report under date of July 15, 1946.

The Commissioner of Internal Revenue has taken the position that the children's interest in the partnership will not be recognized for income tax purposes and that all the income of the partnership will be taxed to their parents. The Commissioner has proposed additional Federal income taxes for the year ended October 31, 1944, as follows:

Elgin R. Parker.....	\$55,589.70
Flo Parker.....	55,562.19

The Commissioner has offered to refund to each guardianship estate the taxes paid by it for the year 1944 in the amount of \$13,986.09 each.

It will be seen that the inclusion in the parents' return of the children's share of the partnership income results in a greater additional tax than the refunds offered to the children. This is due to the fact that the income tax rates increase as the amount of income increases.

The Commissioner bases his contention upon decisions of the Supreme Court of the United States in *A. L. Lusthaus vs. Commissioner*, 66 Sup. Ct. 539, and *Frances E. Tower vs. Commissioner*, 66 Sup. Ct. 532, both decided February 25, 1946, wherein the income of so-called family partnerships was taxed to the husbands who had built up the

business. Since the decisions of the Supreme Court, the Tax Court of the United States and other Federal Courts have followed the Supreme Court cases in facts more nearly paralleling those in the cases involved in the instant case.

It will be seen with respect to the partners of Southern Heater Company that if the adult partners are required to pay the tax on all of the income of the partnership they will have to draw their portions of the income and capital out of the business with the result that in the long run the children will own the business and the parents will have nothing. If this was carried to its logical conclusion the parents would, of course, be completely without assets with which to pay the income tax and the children would own the entire business.

This was not the intention of the parents in making gifts to the children. It was intended that each would pay the tax on his or her share of the income.

It seems entirely probable that the claims of the Commissioner of Internal Revenue in this case will be sustained by the Tax Court and the other Courts of the United States and by the State tax authorities. Your petitioner and his wife will probably file protests and endeavor to effect some settlement and saving of tax but it appears that this is an undertaking with very little prospect of success.

Your petitioner, as an individual, and his wife, Flo Parker, as the donors of interests to the children, believe and claim that if they are required

to pay income tax on the whole of the income of the partnership of Southern Heater Company that the guardianship estates herein involved should transfer to your petitioner and his wife sufficient amounts of money, properties or credits to enable the petitioner and his wife to pay the additional taxes involved. In other words, the guardianship estates should turn over to the petitioner and his wife for the year 1944 an amount equal to the net additional tax demanded by the Commissioner of \$111,151.89. The guardianship estates should turn over to the parents, the claimants herein, amounts equal to the refunds which the guardianship estates may receive from the Collector of Internal Revenue aggregating \$55,944.36 and additional money, properties or credits in an amount of \$55,207.53. This could be done by transferring a credit of \$111,151.89 from the capital accounts of the guardianship estates on the partnership books of Southern Heater Company to your petitioner and Flo Parker in the amounts of \$55,075.94 each, for a total of \$111,151.89.

The petitioner and his wife, Flo Parker, believe that such an adjustment is required by the circumstances of the case, by their intention in making the original gifts, by the impossibility of going on with the situation if such adjustment is not made, and by the equities of the case.

If approval of the compromise herein requested is not granted it is obvious that it will not be long before the Commissioner of Internal Revenue will be filing claims against the guardianship estates for

the income taxes due from the parents on the total income of the partnership. In such case the Commissioner would probably distrain upon the partnership assets and disrupt, if not ruin, the business.

It is believed, therefore, that it is for the best interests of the guardianship estates and for the advantage of the wards that this adjustment be made and that this compromise be approved.

Wherefore, your petitioner prays that the Court hear this matter and authorize the guardian on behalf of the guardianship estates to turn over to Elgin R. Parker and Flo Parker out of the guardianship estates interests in the capital of Southern Heater Company in the amount of \$55,075.94 for the benefit of Elgin R. Parker and the amount of \$55,075.94 for the benefit of Flo Parker on account of 1944 Federal income taxes.

It is further prayed that the Court hear this matter and authorize the guardian on behalf of the guardianship estates to turn over to Elgin R. Parker and Flo Parker out of the guardianship estates interests in the capital of Southern Heater Company for the benefit of Elgin R. Parker and for the benefit of Flo Parker on account of 1944 State income taxes, when the State returns have been audited and the additional State income taxes due from petitioner and his wife, Flo Parker, have been determined, and for further orders as may be proper in the premises.

In view of the fact that your petitioner is the guardian of the respective guardianship estates,

it is requested that the Court order that notice be dispensed with.

Dated August 17, 1946.

/s/ELGIN R. PARKER,
Petitioner.

s/ MELVIN D. WILSON,
Attorney for Petitioner.

State of California,
County of Los Angeles—ss.

Elgin R. Parker, being first duly sworn, on oath deposes and says that he is the petitioner in the above and foregoing Application for Authority to Compromise Claims; that he has read said Application and knows the contents thereof and that the facts therein stated are true as he verily believes.

/s/ ELGIN R. PARKER.

Subscribed and Sworn to before me this 11th day of August, 1946.

[Seal] /s/ L. E. MARTIN,
Notary Public in and for said County and State.

6. Memorandum in re Incidence of Federal Income Tax Liability on 1944 Partnership Income filed September 16, 1946.

The defendant offered this document in evidence and the plaintiffs objected on the ground that it was a memorandum signed by an attorney and expressed matters of opinion rather than statements

of fact and that it was not admissible as an admission against the interests of the plaintiffs. The Court admitted the document over the objection of the plaintiffs.

In the Superior Court of the State of California
In and for the County of Orange

No. A-11392

In the Matter of the Guardianship of

FLO DIAN PARKER, PATRICIA LEE
PARKER, ROWLAND TIBBETTS
PARKER and ARTHUR ELGIN PARKER,
Minors.

MEMORANDUM IN RE INCIDENCE OF FED-
ERAL INCOME TAX LIABILITY ON 1944
PARTNERSHIP INCOME

A. Result if Children Pay No Tax at All

	Share of Partnership Income	Tax Burden	Balance Left After Federal Tax
Father	\$ 69,138.48	\$ 97,053.85	(\$27,915.37)
Mother	69,138.48	96,838.84	(27,700.36)
Flo Dian	31,569.24	.....	31,569.24
Patricia	31,569.24	.....	31,569.24
Rowland	31,569.24	.....	31,569.24
Arthur	31,569.24	.....	31,569.24
Totals.....	\$264,553.92	\$193,892.69	\$70,661.23

B. Result if All Share the Tax Burden in the
Original Proportions

	Share of Partnership Income	Tax Burden	Balance Left After Federal Tax
Father	\$ 69,138.48	\$ 57,973.91	\$11,164.57
Mother	69,138.48	57,702.46	11,436.02
Flo Dian	31,569.24	19,554.08	12,015.16
Patricia	31,569.24	19,554.08	12,015.16
Rowland	31,569.24	19,554.08	12,015.16
Arthur	31,569.24	19,554.08	12,015.16
Totals.....	\$264,553.92	\$193,892.69	\$70,661.23

C. Result if Children Pay All of the Additional Tax

	Share of Partnership Income	Tax Burden	Balance Left After Federal Tax
Father	\$ 69,138.48	\$ 41,464.15	\$27,674.33
Mother	69,138.48	41,276.65	27,861.83
Flo Dian	31,569.24	27,787.98	3,781.26
Patricia	31,569.24	27,787.97	3,781.26
Rowland	31,569.24	27,787.97	3,781.26
Arthur	31,569.24	27,787.97	3,781.26
Totals.....	\$264,553.92	\$193,892.69	\$70,661.20

Comments

1. Situation A is insufferable and unintended.

2. Situation B is unsatisfactory because the parents pay California Income Tax of about \$3,000.00 each, in addition to the Federal tax, and support themselves and five children. This would take approximately all of their earnings, while

the four children grew rich. This would be unfair to the fifth child, which has received no gift.

The parents paid considerable gift taxes on the 1943 gifts of interests in the business. Furthermore, the tax authorities will probably contend that the parents are subject to gift tax on the profits of each year which are credited to the children—that this was the parents' income, and when set over to the children on the partnership books, constitute a taxable gift.

The father received a salary of but \$12,000, whereas his services were worth at least \$52,000 per year. If a full and fair salary of \$52,000 per year had been paid the father, a result more comparable to that shown in situation C would have obtained.

3. Situation C is most equitable result. Out of the balance remaining to the parents, they would pay California income tax of about \$3,000 a year each, support themselves and five children, and have a reasonable balance left. The children would build up a considerable amount over a period of years.

The parents furnished all of the capital, do all the work and support the children, so should be taken care of first.

Under C, the children would still be in a favorable and fortunate position. They would receive, after all taxes, State and Federal, about 12% on their original gift.

4. California income tax is still to be reckoned

with, and should be settled on the same basis as the Federal tax.

5. This problem continues for all of 1945 and for four months of 1946, after which corporations were formed.

/s/ MELVIN D. WILSON.

7. Third Annual Account of Guardian.

This account records the activities of the partnership and of the guardian for the year ended October 31, 1946. It asks that the account be approved except that the pending claims of Elgin R. Parker and Flo Parker for adjustment on account of income taxes, which had not been acted upon by the Superior Court.

8. Decree Settling Third Annual Account of Guardian filed April 25, 1947. The Court made a decree approving the Third Annual Account and ordering the payment of attorneys' fees in the amount of \$100.00.

9. Fourth Annual Account of Guardian and Application for Authority to Compromise Claims, filed July 16, 1948.

This account showed the operations of the partnership and of the guardianship estates to March 31, 1948.

The guardian also asked authority of the Court

to use the federal income tax refunds payable to the children for 1945 and 1946 in the same manner and under the same terms as were set forth in plaintiffs' Exhibits No. 16 for the taxable year, 1944.

The account also requested authority of the Court to transfer the real estate owned by the partnership and costing \$58,000.00 to a corporation, about to be formed, to be known as The Parker Corporation, in consideration of issuing to the partnership all the outstanding stock of the corporation of a par value of \$58,000.00 and stated that the officers of the corporation would be Elgin R. Parker and his wife and sister who was an employee of the partnership.

The application stated that it was believed to be for the best interests of the guardianship estates to have the property owned by a corporation, as such ownership would prevent the title to the property being in undivided interests in several persons, such as might be the case should some of the wards attain majority or marry and die leaving a spouse or issue. If interests in the property fell into hands of persons with divergent views from the other owners of the interests, it would depress the value of each interest.

10. Order Settling Fourth Annual Account of Guardian filed July 30, 1948.

In the Superior Court of the State of California
In and for the County of Orange
No. A-11392

In the Matter of the Guardianship of

FLO DIAN PARKER, PATRICIA LEE
PARKER, ROWLAND TIBBETTS
PARKER and ARTHUR ELGIN PARKER,
Minors.

ORDER SETTLING FOURTH ANNUAL AC-
COUNT OF GUARDIAN AND ORDER FOR
PAYMENT OF ATTORNEY'S FEES AND
ORDER FOR AUTHORITY TO COMPRO-
MISE CLAIMS AND ORDER INSTRUCT-
ING GUARDIAN ON INVESTMENT OF
FUNDS OF WARDS

Comes now Elgin R. Parker, guardian of the guardianship estates of Flo Dian Parker, Patricia Lee Parker, Rowland Tibbetts Parker and Arthur Elgin Parker, minors, by Melvin D. Wilson, Attorney, and presents to the Court for settlement his Fourth Annual Account showing charges in favor of each of said guardianship estates amounting to \$89,078.02 and claiming credits amounting to \$1,084.50, leaving a balance of \$87,993.52 in his hands belonging to each of said guardianship estates, subject to unsettled claims of Elgin R. Parker and Flo Parker for adjustment on account of federal and state income taxes for the years 1944, 1945 and 1946; that he now proves to the satisfaction of the Court that said account was filed

on or about the — day of July, 1948; that the Clerk thereupon appointed the 30th day of July, 1948, as the time for the settlement thereof; that notice of the time and place of said settlement has been duly given as required by law and that no person appearing to except to or contest said account, the Court, after hearing evidence, finds said account correct and that the attorney's fees set forth in the accompanying report are justly due and payable out of said estate.

It Is Therefore Ordered, Adjudged and Decreed by the Court that said account be in all respects approved, allowed and settled and that Elgin R. Parker forthwith, out of the moneys in his hands belonging to said estates, pay to Melvin D. Wilson, Esq., the amount of \$400.00.

It Is Also Ordered, Adjudged and Decreed by the Court that the action of the guardian of each of said guardianship estates in retaining in the partnership of Southern Heater Company the earnings thereof for the seventeen months period ended March 31, 1948, excepting the withdrawals for personal use and current federal and state income taxes in the amount of \$1,084.50 for each estate, be hereby approved, allowed and settled.

The petition of Elgin R. Parker, as guardian of the above named estates, for authority to compromise claims against the guardian and the application for instruction on investment of funds of wards, coming on regularly to be heard this 30th day of July, 1948, and the Court, after examining the petition and hearing the evidence, finds that notice of the time and place of such hearing has

been duly given as required by law and that no person appearing to except to or contest said petition, finds that all of the allegations of said petition are true and that the conditional or tentative compromise of claims prayed for in said petition is equitable and proper and correct.

It Is Therefore Ordered by the Court that the guardian of each of said guardianship estates is hereby authorized as follows:

1. That he as guardian is authorized by this Court to sign an offset statement with Elgin R. Parker and Flo Parker and the Commissioner of Internal Revenue where the refunds due to the guardianship estates for the years 1945 and 1946 may be credited against the additional taxes claimed by the Commissioner of Internal Revenue to be due from Elgin R. Parker and Flo Parker for the years 1945 and 1946.

2. That in the event Elgin R. Parker and Flo Parker eventually lose their litigation with the Commissioner of Internal Revenue with respect to the incidence of the tax on the income of this partnership that Elgin R. Parker and Flo Parker are permitted to keep and retain said refunds in at least part settlement of their claims against the guardianship estates on account of income taxes.

3. In the event that Elgin R. Parker and Flo Parker eventually win their litigation with the Commissioner of Internal Revenue with respect to the incidence of tax on the income of this partnership for the years 1945 and 1946 that Elgin R.

Parker and Flo Parker pay to these guardianship estates the said refunds, plus any interest benefits that have been obtained by said Elgin R. Parker and Flo Parker thereon and that this procedure is in complete settlement of said claims by said Elgin R. Parker and Flo Parker against said guardianships.

4. That in the event Elgin R. Parker and Flo Parker eventually lose their litigation with the Commissioner of Internal Revenue respecting income tax on the income of this partnership for the years 1945 and 1946 that the matter of the claims by Elgin R. Parker and Flo Parker against these guardianship estates on account of income taxes for those years be further considered and, if necessary, adjudicated.

5. That arrangements similar to the above be made with respect to California income taxes in the event that the Franchise Tax Commissioner of the State of California makes determinations similar to those made by the Commissioner of Internal Revenue for the years 1945 and 1946.

The Court Further Orders that Elgin R. Parker, as guardian of the above-entitled guardianship estates, be hereby authorized and instructed to participate in taking the following steps:

1. To cause the formation of a corporation to be known as The Parker Corporation, or a similar name, with an authorized capital of \$100,000.00 consisting of 1,000 shares of capital stock, each of a par value of \$100.00; to transfer to said corpora-

tion from the assets of Southern Heater Company (a partnership) real property of a book value of approximately \$57,479.04 and cash in the amount of \$886.36, consideration for the issuance by said corporation to the partnership of stock of the par value of \$58,000.00, to be the then only outstanding stock of said corporation.

2. The partnership known as Southern Heater Company may continue in operation owning cash, stocks and other assets.

3. The above transfer to be made conditional upon obtaining approval of the surety and the pertinent state and federal authorities.

Dated: This 30th day of July, 1948.

/s/ ROBERT GARDNER,

Judge of the Superior Court.

[Endorsed]: Filed July 30, 1948.

11. Fifth Annual Account of Guardian, filed November 15, 1948.

This account stated that four claims had been presented against the guardianship estates and had not been settled except on a tentative basis.

It showed that each guardianship estate had a 12½% interest in the partnership known as Southern Heater Company, having a book value of \$84,589.92 and Series E Bonds having a cost of \$3,750.00 or a total for each estate of \$88,339.92.

The operating statement of the partnership for

the period April 1, 1948, to October 31, 1948, was shown as well as an analysis of the partnership capital and the balance sheet at October 31, 1948.

The account prayed for authority to pay attorneys' fees of \$200.00.

The account showed that the partnership, as of October 31, 1948, owned practically nothing except the stock of four corporations; namely, Southern Heater Corporation, American Control Corporation, The Parker Realty Company and Radiantair, Inc. and the notes signed by Elgin R. Parker and Flo Parker payable to the partnership. It stated that the notes of Elgin R. Parker and Flo Parker, owned by the partnership, were given to the partnership to represent the obligations to repay excessive withdrawals made by Elgin R. Parker and Flo Parker to enable said persons to pay their income taxes. The account said, "If the said parties win their income tax cases, they can pay the notes out of their income tax refunds. In the event they lose the income tax cases, they will seek further adjustment, with the approval of this Court, against the guardianship estates on account of income tax matters."

The report said that in as much as all the activities of the partnership had been reduced to the mere holding of stock of corporations, it was believed that it would be to the best interests of the partners and the guardianship estates that the partnership be dissolved and the stock and notes distributed to the partners who would hold them directly, or through their guardian.

The report prayed for approval of the account, showing the unsettled claims against each guardianship estate filed by Elgin R. Parker and Flo Parker for adjustment on account of income taxes; that an order be made for the payment of attorneys' fees of \$200.00; that the dissolution of the partnership be approved and the distribution of its assets directly to the partners or to the guardianship estates be authorized.

An Order Settling Fifth Annual Account of Guardian filed December 7, 1948, was made by the Court and appears among the plaintiffs' exhibits No. 3.

DEFENDANT'S EXHIBIT B

Flo Dian Parker (a minor)
(Individual)

Los Angeles Div.
LA:30D

Acceptance of Proposed Overassessment
Return filed in Sixth Collection District of California.

[Stamped]: To Bureau, May 19, 1947.
L. L. C.

The following overassessment or overassessments of tax are hereby accepted as correct:

taxable year ended December 31, 1944,
income tax in the sum of..... \$13,986.09
taxable year ended, income tax
in the sum of..... \$.
taxable year ended (declared
value) excess-profits tax in the sum of \$.

taxable year ended excess profits

tax in the sum of \$

taxable year ended in the sum of \$

amounting to the total sum of \$

as indicated in the statement furnished the undersigned taxpayer(s), under date of July 15, 1946.

FLO DIAN PARKER (a minor),
(Taxpayer)

By /s/ ELGIN R. PARKER,

Guardian,

Box 629, Compton,
California.

[Stamped]: Received April 30, 1947. Internal Revenue Agent in Charge, Los Angeles Division.

Date: April 30, 1947.

NOTE.—The execution and filing of this acceptance at the address shown in the accompanying letter will expedite the indicated adjustment of your tax liability. This acceptance is not an agreement as provided under section 3760 of the Internal Revenue Code.

If this acceptance is executed with respect to a year for which a Joint Return of a Husband and Wife was filed, it must be signed by both spouses, except that one spouse may sign as the agent for the other.

Where the taxpayer is a corporation, the agreement shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed.

DEFENDANT’S EXHIBIT B

Patricia Lee Parker (a minor)
(Individual)

Los Angeles Div.
LA :30D

Acceptance of Proposed Overassessment

Return filed in Sixth Collection District of California.

[Stamped]: To Bureau, May 19, 1947.
L. L. C. ..

The following overassessment or overassessments of tax are hereby accepted as correct:

taxable year ended December 31, 1944,	
income tax in the sum of.....	\$13,986.09
taxable year ended, income tax	
in the sum of.....	\$.....
taxable year ended (declared	
value) excess-profits tax in the sum of	\$.....
taxable year ended excess profits	
tax in the sum of	\$.....
taxable year ended.....in the sum of	\$.....
	<hr/>

amounting to the total sum of..... \$.
as indicated in the statement furnished the under-
signed taxpayer(s), under date of July 15, 1946.

PATRICIA LEE PARKER

(a minor),

(Taxpayer)

By /s/ ELGIN R. PARKER,

Guardian,

Box 629, Compton,

California.

[Stamped]: Received April 30, 1947. Internal
Revenue Agent in Charge, Los Angeles Division.

Date: April 30, 1947.

NOTE.—The execution and filing of this acceptance at the address shown in the accompanying letter will expedite the indicated adjustment of your tax liability. This acceptance is not an agreement as provided under section 3760 of the Internal Revenue Code.

If this acceptance is executed with respect to a year for which a Joint Return of a Husband and Wife was filed, it must be signed by both spouses, except that one spouse may sign as the agent for the other.

Where the taxpayer is a corporation, the agreement shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed.

DEFENDANT'S EXHIBIT B

Arthur Elgin Parker (a minor)
(Individual)

Los Angeles Div.
LA:30D

Acceptance of Proposed Overassessment

Return filed in Sixth Collection District of California.

[Stamped]: To Bureau, May 19, 1947.
L. L. C. ..

The following overassessment or overassessments of tax are hereby accepted as correct:

taxable year ended December 31, 1944,	
income tax in the sum of.....	\$13,986.09
taxable year ended, income tax	
in the sum of.....	\$.....
taxable year ended (declared	
value) excess-profits tax in the sum of	\$.....
taxable year ended excess profits	
tax in the sum of	\$.....
taxable year ended.....in the sum of	\$.....
<hr/>	
amounting to the total sum of.....	\$.....

as indicated in the statement furnished the undersigned taxpayer(s), under date of July 15, 1946.

ARTHUR ELGIN PARKER

(a minor),

(Taxpayer)

By /s/ ELGIN R. PARKER,

Guardian,

Box 629, Compton,

California.

[Stamped]: Received April 30, 1947. Internal Revenue Agent in Charge, Los Angeles Division.

Date: April 30, 1947.

NOTE.—The execution and filing of this acceptance at the address shown in the accompanying letter will expedite the indicated adjustment of your tax liability. This acceptance is not an agreement as provided under section 3760 of the Internal Revenue Code.

If this acceptance is executed with respect to a year for which a Joint Return of a Husband and Wife was filed, it must be signed by both spouses, except that one spouse may sign as the agent for the other.

Where the taxpayer is a corporation, the agreement shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed.

DEFENDANT'S EXHIBIT B

Rowland Tibbetts Parker (a minor)
(Individual)

Los Angeles Div.

LA:30D

Acceptance of Proposed Overassessment
Return filed in Sixth Collection District of California.

[Stamped]: To Bureau, May 19, 1947.

L. L. C.

..

The following overassessment or overassessments of
tax are hereby accepted as correct:

taxable year ended December 31, 1944,	
income tax in the sum of.....	\$13,986.09
taxable year ended, income tax	
in the sum of.....	\$.....
taxable year ended (declared	
value) excess-profits tax in the sum of \$.....	
taxable year ended excess profits	
tax in the sum of	\$.....
taxable year ended.....in the sum of \$.....	

amounting to the total sum of..... \$.....
as indicated in the statement furnished the under-
signed taxpayer(s), under date of July 15, 1946.

ROWLAND TIBBETTS

PARKER (a minor),
(Taxpayer)

By /s/ ELGIN R. PARKER,
Guardian,

Box 629, Compton,
California.

[Stamped]: Received April 30, 1947. Internal

Revenue Agent in Charge, Los Angeles Division.

Date: April 30, 1947.

NOTE.—The execution and filing of this acceptance at the address shown in the accompanying letter will expedite the indicated adjustment of your tax liability. This acceptance is not an agreement as provided under section 3760 of the Internal Revenue Code.

If this acceptance is executed with respect to a year for which a Joint Return of a Husband and Wife was filed, it must be signed by both spouses, except that one spouse may sign as the agent for the other.

Where the taxpayer is a corporation, the agreement shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed.

[Endorsed]: Filed January 10, 1950. U.S.D.C.

[Endorsed]: Filed April 13, 1950. U.S.C.A.

Defendant's Exhibits C and D.

DEFENDANT'S EXHIBIT C

Federal Income Taxes in the Event the Jury Finds
That the Partnership Should Be Recognized
for Income Tax Purposes.

Taxable Year 1944

Elgin R. Parker	\$ 41,825.39
Flo Parker	41,637.88
Elgin R. Parker, guardian for	
Patricia Lee	14,309.22
Rowland Tibbetts	14,309.22
Arthur Elgin	14,309.22
Flo Dian	14,309.22

Total Tax Liability of Family..... \$140,700.15

Federal Income Tax of the Parker Family in the
Event the Jury Finds That the Family Part-
nership Should Not Be Recognized for Income
Tax Purposes.

Elgin R. Parker's will be.....	\$ 97,053.85
Flo Parker's will be	96,838.84

Total Tax Liability \$193,892.69

Parker family will save Federal income
taxes if jury finds that the partner-
ship should be recognized for Fed-
eral income tax purposes in the
amount of \$ 53,192.54

Federal Income Tax Refunds Made to the
Parker Children—Taxable Year 1944

Patricia Lee	\$13,986.09	With 6% Interest
Rowland Tibbetts ...	13,986.09	“ “ “
Arthur Elgin	13,986.09	“ “ “
Flo Dian	13,986.09	“ “ “

Total Refunds... \$55,944.36

[Endorsed]: Filed January 10, 1950. U.S.D.C.

[Endorsed]: Filed April 13, 1950. U.S.C.A.

DEFENDANT'S EXHIBIT D

Federal Income Taxes in the Event the Jury Finds
That the Partnership Should Be Recognized
for Income Tax Purposes.

Taxable Year 1945

Elgin R. Parker	\$ 35,639.91
Flo Parker	35,853.63
Elgin R. Parker, guardian for	
Patricia Lee	11,591.54
Rowland Tibbetts	11,591.54
Arthur Elgin	11,591.54
Flo Dian	11,591.54

Total Tax Liability of Family.... \$117,859.70

Federal Income Tax of the Parker Family in the Event the Jury Finds That the Family Partnership Sohuld Not Be Recognized for Income Tax Purposes.

Elgin R. Parker's will be.....	\$ 82,024.13
Flo Parker's will be.....	82,276.23
<hr/>	
Total Tax Liability	\$164,300.36

Parker family will save Federal income taxes if the Jury finds that the partnership should be recognized for Federal income tax purposes in the amount of \$ 46,440.66

Federal Income Tax Refunds Made to the Parker Children—Taxable Year 1945

Patricia Lee	\$11,584.44	With 6% Interest
Rowland Tibbetts ...	11,584.44	“ “ “
Arthur Elgin	11,584.44	“ “ “
Flo Dian	11,584.44	“ “ “
<hr/>		
Total Refunds...	\$46,337.76	

Federal Income Taxes in the Event the Jury Finds
That the Partnership Should Be Recognized
for Income Tax Purposes

Taxable Year 1946

Elgin R. Parker.....	\$ 49,206.72
Flo	49,206.72
Elgin R. Parker, guardian for	
Patricia Lee	16,175.73
Rowland Tibbetts	16,175.73
Arthur Elgin	16,175.73
Flo Dian	16,175.73
<hr/>	
Total Tax Liability of Family....	\$163,116.36

Federal Income Tax of the Parker Family in the
Event the Jury Finds the Family Partner-
ship Should Not Be Recognized for Income
Tax Purposes

Elgin R. Parker's will be.....	\$111,247.55
Flo Parker's will be	111,247.55
<hr/>	
Total Tax Liability	\$222,495.10

Parker family will save Federal income taxes if
jury finds that the partnership should be recog-
nized for Federal income tax purposes in the
amount of.....\$59,378.74.

Federal Income Tax Refunds Made to the Parker
Children, Taxable Year, 1946

Patricia Lee	\$16,100.62 with 6% Interest
Rowland Tibbetts	16,100.61 with 6% Interest
Arthur Elgin	16,100.62 with 6% Interest
Flo Dian	16,100.61 with 6% Interest

Total Refunds\$64,402.46

Dated March 27, 1950.

The undersigned, attorney for appellants, certifies that in my opinion the above Statement of Evidence covers in condensed form all the evidence introduced at the trial.

/s/ MELVIN D. WILSON.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 28, 1950.

[Title of District Court and Causes.]

COURT'S INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the jury, you have listened to counsel this morning and now you are going to have to go through the ordeal of listening to me while I give you the instructions covering the law of the case.

It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

These two cases, consolidated for trial, were brought by Elgin R. Parker and his wife, Flo Parker, against the Collector of Internal Revenue for the recovery of federal income taxes paid by them for the calendar year 1944.

Elgin Parker sues to recover \$63,309.91 and Flo Parker sues to recover \$63,477.71. Both parties seek interest on those amounts. These suits, which will be hereinafter referred to in the singular, since they both involve the same question and the same facts, are in reality against the United States since if taxpayers, plaintiffs in this action, recover the judgments must be paid from the Treasury of the United States.

There is no issue between the parties to this action as to the amount of income derived from the business known as Southern Heater Company during the calendar year 1944. There is a controversy between them concerning the persons to whom that income is taxable.

The plaintiffs contend that each of them was en-

titled to a distributive share of the net income of Southern Heater Company equal to 25 per cent of said income and that their four minor children were partners in said enterprise and each entitled to a distributive share of $12\frac{1}{2}$ per cent of the total net income. The defendant, as Collector of Internal Revenue, contends that none of the four minor children were partners in said enterprise and each entitled to a distributive share of $12\frac{1}{2}$ per cent of the total net income. The defendant, as Collector of Internal Revenue, contends that none of the four minor children of the plaintiffs were partners for income tax purposes in the business enterprise known as Southern Heater Company and that the income from that business was taxable to each of the parents in equal shares.

It is undisputed that prior to October 31, 1943, plaintiffs were partners in a partnership known as Southern Heater Company, engaged in the business of manufacturing and selling heaters, with its place of business located at 133 East Palmer Street, Compton, California. Plaintiffs on and prior to that date owned all of the assets of the Southern Heater Company. They had four children whose names and ages on October 31, 1943, were: Flo Dian Parker, age 14; Patricia Lee Parker, age 11; Roland Tibbetts Parker, age 6, and Arthur Elgin Parker, age 3.

On October 31, 1943, plaintiffs executed separate deeds of gifts in favor of each of their children in consideration of love and affection, under which

the taxpayers purported to assign and convey to each of the children a one-eighth interest in the assets of the Southern Heater Company partnership. At that time plaintiff Elgin R. Parker was appointed by the Superior Court of Orange County, California, as guardian of the estates of his four children and obtained authority to execute, on behalf of his minor children, a partnership agreement.

On November 1, 1943, a written partnership agreement was entered into between Elgin R. Parker, Flo Parker, and Elgin R. Parker as guardian for the children, to continue the Southern Heater Company with the same assets as before. For the period here concerned, which is confined to the period from November 1, 1943, the date of the formation of the partnership, to October 31, 1944, the net income from the partnership amounting to \$264,553.92 was returned, for federal income tax purposes, 25 per cent by Elgin Parker, 25 per cent by Flo Parker, and 12½ per cent by each of the aforesaid minor children. The Commissioner of Internal Revenue concluded that the net income of the partnership should be taxed one-half to Elgin Parker and one-half to Flo Parker and none of the income could be taxed to the children.

That additional income taxes paid for 1944 by these plaintiffs were assessed by the Commissioner of Internal Revenue, whose action in making the assessment of said additional taxes is presumed to be correct, and before these plaintiffs, or either

of them, are entitled to a refund of any part of the additional income taxes paid by them for the calendar year 1944 it must be established by a preponderance of the evidence that the Commissioner's action in determining that no recognizable partnership relation existed between these plaintiffs and their four minor children for income tax purposes, and that the entire net income of the Southern Heater Company for 1944 was includible in the incomes of the plaintiffs for that year and in assessing said additional income taxes against the plaintiffs, was erroneous.

These cases involve taxes collected from Elgin R. Parker and Flo Parker by the defendant, Harry C. Westover, as Collector of Internal Revenue for the United States of America.

It is fundamental law in our United States that no person can be taxed on income unless he earns that income.

Common understanding and experience are the touchstones for the interpretation of the revenue laws. The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid. The one who earns income but gives the right to receive that income to a favorite child has enjoyed the benefit of that income within the meaning of the Internal Revenue laws.

Individuals carrying on business in partnership are liable for federal income taxes only in their individual capacity.

By including their four minor children as well as themselves as partners in the business known as "Southern Heater Company," the plaintiffs, Elgin R. Parker and Flo Parker, his wife, reduced the federal income taxes of their family group for the calendar year 1944 from \$193,892.69 to \$138,685.16, thereby effecting a tax savings for the Parker family of \$55,207.53.

The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted. The existence of the family relationship does not create a status which determines tax questions in the cases you are now considering but is simply a warning that things may not be what they seem. Transactions between members of a family are to be carefully scrutinized lest what is in reality but one economic unit be multiplied into two or more by devices which, though valid under state law, are not conclusive so far as the acts of Congress imposing federal income taxes are concerned.

A gift of an interest in a family business, whether absolute or in trust, which makes no real change in the economic situation of the group or in the control or management of the business, will not reduce the obligations of the donor to account for and pay income tax on the earnings of the enterprise to the same extent as before the gift was made.

As I stated before, the issue in this case is

whether the partners, Elgin R. Parker and Flo Parker, really and truly intended that their four minor children would own an interest in the partnership assets and whether they intended that all six of them would join together for the purpose of carrying on the business and sharing in the profits and the losses as partners.

The Supreme Court has defined a partnership as follows: A partnership is generally said to be created when persons join together their money, goods, labor, or skill, for the purpose of carrying on a trade, profession, or business, and where there is community of interest in the profits and losses.

While the fact that the partnership in this case is made up of members of a family does not in and of itself establish that the arrangements should be disregarded for federal income tax purposes, that fact is a warning that things may not be what they seem. Transactions between members of a family should be carefully scrutinized to determine whether the arrangement is substantial and in reality is what it appears on the surface to be. In considering whether or not the partnership with the minor children is of sufficient substance to justify the splitting of the income of the business for federal income tax purposes, you may do so with the realization that the relationship between members of a family often makes it possible for one of the members to shift tax incidence by surface changes of ownership without disturbing in the least his domination and control over the subject

of the gift for the purposes for which the income from the property is used. He is able, in other words, to retain the substance of full enjoyment of all the rights which he had previously in the property.

While partnerships between husbands and wives, or between parents and children, are always open to scrutiny, and to close scrutiny, such partnerships are lawful. There can be legal partnerships between husbands and wives and parents and children under California law.

The fact that transfers to members of the family group may be mere camouflage does not, however, mean that they invariably are.

There is no federal law that prohibits a family partnership or a partnership between parents and minor children.

And there is no reason why Mr. or Mrs. Parker or anyone else should not reduce their taxes by a lawful partnership. "Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands; taxes are enforced exactions, not voluntary contributions."

Whether or not the purported partners have actually set up a real partnership or not, may also be attacked by outsiders, whether these outsiders are ordinary business creditors or, as in this case, the defendant, the Collector of Internal Revenue.

Here the Collector, the defendant, has said that this is not a bona fide or real partnership, and the issue is whether he is right or not.

And so, members of the jury, we come to the issue that I stated at the beginning: Was this really and truly a business partnership for the year 1944, and during that year did each of these four children through their guardian actually own their share of the partnership earnings?

There has been considerable evidence of matters prior to 1943 and 1944 and subsequent to then. That evidence is proper for you to consider, along with all of the other evidence, in throwing whatever light, if it does throw any light, on the question of whether there was a real intent to form a genuine partnership in the years 1943 and 1944.

In computing the net income of a partner for the purpose of determining the federal income tax payable by that partner there shall be included in the partner's net income his distributive share of the gains and losses sustained by the partnership from sales or exchanges of its capital assets and his distributive share of the ordinary net income or net loss of the partnership whether or not distribution of such gain, net income or loss of the partnership is actually made to the partner.

And in considering the provisions of the Internal Revenue Code and the various revenue acts which impose the income taxes whose refund is sought by the plaintiffs in these actions you are not to be so much concerned with the refinements of

title as with the actual command over the income which is taxed and the actual benefit for which the tax is paid. One vested with the right to receive income does not escape the income tax by any kind of anticipatory arrangement, however skillfully devised, by which he procures payment of it to another, since, by the exercise of his power to command the income, he enjoys the benefit of the income on which the tax is laid.

The transactions between the plaintiffs and their minor children should be carefully scrutinized by you and that if you determine from all the facts that the plaintiffs were able to retain the substance of all the rights which previously they had in the Southern Heater Company then you must determine that there was no valid partnership between the plaintiffs and their minor children for federal income tax purposes during the year 1944.

And you must determine after considering all of the facts, including the agreement between these plaintiffs and their minor children, the conduct of the parties to that agreement in the execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of the income and the purposes for which it was used, and any other facts throwing light on the true intent of the parties to the agreement whether those parties in good faith and acting with a business purpose intended to join

together in the present conduct of the enterprise known as Southern Heater Company.

In determining whether a witness is a credible one, or whether his testimony is to be believed, you should consider his manner upon the witness stand, his intelligence, the opportunity he has had to observe, or obtain knowledge of, the matters of which he testifies, the way in which he gives his testimony, his interest in the case, his relation to the parties or subject in controversy, and everything which may show bias or prejudice or the lack of it.

The testimony of one witness, entitled to full credit, is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even if a number of witnesses have testified to the contrary, if, from the whole case, considering the credibility of the witnesses, and after weighing the various factors of evidence, the jury should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness.

A fact proven to your satisfaction by proof of circumstances from a consideration of various items of indirect evidence, is nonetheless effectively established as though it depended upon direct evidence. Such circumstances must be connected in such a way as to concur and lead directly to the consideration which may be indicated thereby.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and

which itself, if true, conclusively establishes the fact. Indirect evidence is that which tends to establish the fact in dispute by providing another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences. A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect. But, unless so controverted, the jury is bound to find according to the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. This must be founded upon a fact or facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the persons whose act is in question, the course of the business or course of nature. The word "propensity" as used in this instructions means "natural or habitual inclination or tendency."

A fact proven to your satisfaction by proof of circumstances from a consideration of various items of indirect evidence, is nonetheless as effectively established as though it depended upon direct evidence. Such circumstances must be connected in such a way as to concur and lead directly to the conclusion which may be indicated thereby.

In every civil action, as this one is, the burden

is on the plaintiff to prove his case by a preponderance of the evidence. Preponderance of the evidence means the greater weight of the credible evidence as you find it to be. If, in your final estimate, this evidence is equally balanced as to the important facts, the plaintiffs will not have established such facts sufficiently. On the other hand, any preponderance of the evidence, however slight, in the plaintiffs' favor requires a verdict for the plaintiffs.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. The presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by the evidence affecting his character for truth, honesty, or integrity or his motives; or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men and women. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the parties, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by

other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury may distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against any party to the action. The attitude of the jurors at the outset of their deliberations is a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if and when shown that it is fallacious. Remember that you are not partisans or advocates in this matter but are judges. The final test of the quality of your service will lie in the verdict which you return to this courtroom, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the court would remind you that in your deliberations, in the jury room, there can be no triumph excepting the ascertainment and declaration of the truth. It is your duty as jurors to

consult with one another and to deliberate, with a view to reaching an agreement if you can do so without violence to your individual judgment. To each of you I would say that you must decide the case yourself but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced it is erroneous.

However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

You should not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of the fact or facts. And if I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party you will not suffer yourselves to be influenced by any such suggestion. I have not expressed nor intended to express, nor have I intimated nor intended to intimate, any opinion as to what witnesses are or are not worthy of credence; what facts are or are not established; or what inference should be drawn from the evidence adduced. If any expression of mine has

seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

At times throughout the trial the court has been called upon to pass upon the question of whether or not certain offered evidence might be properly admitted. With such rulings and the reasons for them you are not concerned. Whether offered evidence is admitted is purely a question of law, and from a ruling on such questions you are not to draw any inference as to what weight should be given the evidence, as to the credibility of a witness. In admitting evidence, to which an objection was made, the court did not determine what weight should be given to such evidence. As to any offer of evidence that was rejected by the court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

If in these instructions any rule, direction, or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole and to regard each in the light of all the others.

The verdict to be rendered must represent the considered judgment of each juror.

In order to return a verdict it is necessary that

each juror agree thereto. Your verdict must be unanimous.

When you retire to the jury room to deliberate, you will select one of your number as foreman and he will sign your verdict for you when it has been agreed upon. You will then return into court with the verdict and your foreman will represent you as your spokesman in the further conduct of this case in this court.

For your convenience two forms of verdict have been prepared. One of the verdicts reads as follows:

“We, the jury in the above-entitled causes, find in favor of the plaintiffs, Flo Parker and Elgin Parker, and against the defendant in each cause.”

And the other one is judgment in favor of the Government.

The parties have stipulated that if there is judgment in favor of the plaintiffs the amounts will be calculated by them. Of course, if judgment is found in favor of the defendant, then the plaintiffs will take nothing, but in order to avoid the necessity of having you worry about figures and amounts counsel have very kindly agreed that such a verdict might be used.

Am I not correct, gentlemen?

Mr. Wilson: Yes, your Honor.

Mr. Garland: Yes, your Honor.

The Court: Now, ladies and gentlemen, it is your problem to determine the intent of the parties in this case as I have instructed you.

The bailiff will now be sworn.

* * *

Mr. Wilson: Thank you. I except to the omission of our requested instruction No. 24. [187]

The Court: An exception to the court's refusal to give plaintiffs' requested instruction 24 will be noted. I want to call your attention to the fact that everything requested in your instruction 24 was covered by the court's instruction. This instruction is argumentative in form and it emphasizes certain facts in this case which the court has purposely avoided doing.

Mr. Wilson: And No. A in the supplemental is the next one.

The Court: Exception noted. I considered that as being covered.

Mr. Wilson: And No. C, your Honor.

The Court: Exception noted.

Requested instruction L I gave in part.

Mr. Wilson: Only the first part, your Honor.

The Court: Yes, the last part I omitted, and an exception will be noted. [188]

* * *

Mr. Wilson: Then No. 31. I except to defendant's No. 31, your Honor, as applied to this case.

The Court: What is that instruction?

Mr. Wilson: The one starting:

“You are instructed that common understanding and experience are the touchstones for the interpretation of the revenue laws. The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid. The one who earns income but gives the right to receive that income to a favorite child has enjoyed the benefit of that income within the meaning of the Internal [189] Revenue laws.”

I think that ignores the property element, the ownership of property, and the fact that the property can earn income.

The Court: I feel I covered that pretty well. I do not think I have unduly stressed the conflicting theories of either party. Exception will be noted.

* * *

The Court: Ladies and gentlemen, my attention has been called to an omission in one of my instructions which I thought the jury was aware of. Perhaps I was technically in error when I instructed you as to the net income of the partnership. That income amounted to \$264,553.92, and it was divided 25 per cent to Elgin Parker and 25 per cent to Flo Parker and 12½ per cent to

each of the aforesaid minor children; that Mr. Parker in addition to that received a salary of \$12,000.00 a year. You will recall the testimony in that respect. The testimony was that before there was any division of earnings a salary of \$12,000.00 per year was drawn by Mr. Parker.

Does that cover your point, counsel?

Mr. Wilson: And that he reported it in the returns for himself and wife.

The Court: I assume that he paid all his income tax.

Mr. Wilson: There is no doubt about it.

The Court: He undoubtedly paid a tax on the \$12,000.00 that he received. Does that cover your point, counsel?

Mr. Wilson: Yes, your Honor.

The Court: Ladies and gentlemen, you may now retire to the jury room.

(Whereupon the jury retired from the courtroom at 11:42 o'clock a.m.)

(At 4:10 o'clock p.m. the jury returned to the courtroom and the following proceedings were had in the presence and hearing of the jury.)

The Court: It is stipulated, gentlemen, the jurors are present and in the jury box?

Mr. Garland: So stipulated.

Mr. Wilson: Yes, so stipulated.

The Court: The bailiff has advised me that you desire to have some additional instructions.

Before I ask what questions you have in mind I wish to state to you that I am not interested and it wouldn't be proper for me to know how the jury stands as a whole or how any individual stands, so I want your questions to be general questions which will not indicate the present state of mind of any jurors.

Who is the foreman?

Juror E. Richard West: I am, sir. I think these questions are in accordance with your instructions.

The first question that we would like to know is, according to the federal law what constitutes a partnership and was the gift taken from the business and re-invested in the business considered a contribution to the welfare of the business?

The second question is, we would like to have you read, sir, in the instructions to the jury with regard to family partnerships. Will you please read the instructions to the jury with regard to

family partnerships—that part of the instructions that you gave us this morning?

The Court: One instruction that I read this morning was:

“A gift of an interest in a family business, whether absolute or in trust, which makes no real change in the economic situation of the group or in the control or management of the business will not reduce the obligations of the donor to account for and pay income tax on the earnings of the enterprise to the same extent as before the gift was made.”

Another one I gave is:

“The issue in this case is whether the partners, Elgin R. Parker and Flo Parker, really and truly intended that their four children would own an interest in the partnership assets and whether they intended that all six of them would join together for the purpose of carrying on the business and sharing in the profits and losses, as partners.”

The Supreme Court has defined a partnership as generally said to be created when persons join together their money, goods, labor, or skill, for the purpose of carrying on a trade, profession, or business, and where there is community of interest in the profits and losses.

And I gave you another instruction as follows:

“While partnerships between husbands and wives, or between parents and children, are always open to scrutiny, and to close scrutiny, such partnerships are lawful. There can be legal partnerships be-

tween husbands and wives and parents and children under California law.”

And another one I gave was:

“The fact that transfers to members of the family group may be mere camouflage does not, however, mean that they invariably are.”

And:

“There is no federal law that prohibits a family partnership or a partnership between parents and minor children.”

This case was tried before a jury and I tried my best to have the issues settled by the jury without giving any of my own viewpoints. I want to read to you again the instduction that I said represented the real issue, and that is:

“You must determine after considering all of the facts, including the agreement between these plaintiffs and their minor children, the conduct of the parties to that agreement in the execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of the income and the purposes for which it was used, and any other facts throwing light on the true intent of the parties to the agreement, whether those parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise known as Southern Heater Company.”

In other words, ladies and gentlemen, it is your problem to determine the intent of these people

when they set up this partnership. Did they intend to make a sham out of it for the purpose of avoiding income taxes or was it a real, genuine business partnership for the purpose of joining together in the present conduct of the enterprise known as Southern Heater Company?

Now, that is the question you have to answer. It is like any other question that you may have to answer. You have to take all the evidence together and look upon the whole picture and then determine was this a sham or was it a real partnership.

That is the question and I can't tell you how to answer it. I make it a practice not to express my own personal opinions in these matters and, as I have told you, I have not intended to express such opinion and I do not now intend to convey to you how I may feel about this case because that is your function. That is what you are here for.

I want to also call your attention to the fact, and not for the purpose of emphasis, but I want to call your attention not to overlook the fact that you have asked for certain instructions with reference to the findings of the commissioner as being presumptively correct. It is your burden to determine by a preponderance of the evidence whether the findings of the Commissioner were erroneous. Unless you can so find by the greater weight of the testimony, then it is your duty to find for the defendant. On the other hand, if you are convinced from all the testimony that the Commissioner was wrong, and by a preponderance of the evidence,

then you should bring in a verdict for the plaintiff. That is your problem and I cannot answer it for you.

I want to call your attention to the fact you have been out for a number of hours. It is getting pretty close to dinner time. When I go home for dinner I will not be available for at least an hour, and I assume it will take the others that long to again meet here.

After 5:00 o'clock the bailiff will provide food and shelter for you, if that is necessary, in order to arrive at a verdict in this case.

I want to call your attention to the fact again that you are sitting here as judges, free from any sympathy, prejudice or bias whatsoever. You will determine this case on the cold-blooded facts. Does the Government owe Mr. and Mrs. Parker this *morning* or doesn't it? That is the question. I hope you can answer it either yes or no and it will not be necessary to call in another jury and put all the parties to the expense they have been put to in trying this case.

If there is nothing further you may retire with the bailiff. If I don't hear from you by 5:00 o'clock, I hope I will hear from you later this evening.

The Foreman: Thank you, sir.

(Whereupon the jury retired from the courtroom and the following proceedings were had without the presence and hearing of the jury:)

The Court: Any exceptions?

Mr. Wilson: No.

Mr. Garland: No.

* * *

[Endorsed]: Filed March 28, 1950.

[Title of District Court and Causes.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 147, inclusive, contain the original Complaint; Answer; Demand for Jury Trial and Judgment on the Verdict in each of the above-entitled causes and the original Statement of Evidence; Plaintiffs' Requests to Charge; Plaintiffs' Supplemental Requests to Charge; Defendant's Requested Instructions Refused; Verdict of the Jury; Notice of Entry of Judgment; Notice of Appeal; Cash Bond on Appeal; Statement of Points Relied on on Appeal; Plaintiffs' Designation of Record on Appeal; Defendant's Designation of Record on Appeal and Motion and Order Extending Time for Filing Record on Appeal entitled in both of the above-entitled causes which, together with copy of Reporter's Transcript of Proceedings on January 10 and 11, 1950, and original Defendant's Exhibits A, B, C and D, transmitted herewith,

constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 11th day of April, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal]: By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12520. United States Court of Appeals for the Ninth Circuit. Flo Parker and Elgin R. Parker, Appellants, vs. Harry C. Westover, Individually and as Collector of Internal Revenue for the Sixth District of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 12, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12520

ELGIN R. PARKER,

Appellant,

vs.

HARRY C. WESTOVER, Individually and as
Collector of Internal Revenue for the Sixth
District of California,

Appellee.

No. 12520

FLO PARKER,

Appellant,

vs.

HARRY C. WESTOVER, Individually and as
Collector of Internal Revenue for the Sixth
District of California,

Appellee.

DESIGNATION OF THE PARTS OF THE
RECORD NECESSARY FOR THE CON-
SIDERATION OF THE APPEAL

To the United States Court of Appeals for the
Ninth Circuit:

The appellants hereby designate the following
parts of the record necessary for the consideration
of the appeal:

1. Complaints.

2. Answers to Complaints.
3. Demands for Jury Trial.
- 4 Stipulation for the Consolidation of Cases for Trial.
5. Statement of the Evidence (together with the exhibits or parts of exhibits specified in said Statement of Evidence.)
6. Judge's Instructions to the Jury (Reporter's Transcript, page 170, line 1, to page 187, line 7, inclusive, and page 190, line 21, to page 197, line 10).
7. Appellants' Requested Instructions Nos. 24, A, C, L (pages 85, 100, 102 and 111, respectively, of the certified transcript).
8. Defendant's Requested Instruction No. 31.
9. Exceptions to the Judge's Instructions by the appellants (Reporter's Transcript, page 187, line 24 to page 188, line 17 and page 189, line 13 to page 190, line 7).
10. The Verdict of the Jury.
11. The Judgments Appealed From.
12. Notice by Clerk of Entry of Judgment.
13. Notices of Appeal with dates of filing.
- 4. The Designation as to Matters to be Included in the Record.
15. Designation of Points on Which Appellants Intend to Rely.

16. Cost Bond.

Clerk's Certificate.

Dated this 14th day of April, 1950.

/s/ MELVIN D. WILSON,
Attorney for Appellants.

To Ernest A. Tolin, United States Attorney; E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys; Eugene Harpole and James D. Pettus, Special Attorneys; Bureau of Internal Revenue:

Please take notice that the foregoing Designation of the Parts of the Record Necessary for the Consideration of the Appeal is being filed forthwith in the above-entitled case.

/s/ MELVIN D. WILSON,
Counsel for Appellants.

Service acknowledged.

[Endorsed]: Filed April 24, 1950.

[Title of District Court and Cause.]

STATEMENT OF THE POINTS ON WHICH
APPELLANTS INTEND TO RELY

To the United States Court of Appeals for the
Ninth Circuit:

The appellants hereby adopt the Statement of
the Points on Which They Intend to Rely, which

was filed in the District Court, as their Statement of the Points on Which They Intend to Rely in this Court.

Dated April 14, 1950.

/s/ MELVIN D. WILSON,
Counsel for Appellants.

The appellee, Harry C. Westover, Collector for the Sixth District of California, through his attorneys, hereby accepts service of a copy of the foregoing Statement of the Points on Which Appellants Intend to Rely.

ERNEST A. TOLIN,
United States Attorney.

E. H. MITCHELL and
EDWARD R. McHALE,
Assistant United States
Attorneys.

EUGENE HARPOLE and
JAMES D. PETTUS,
Special Attorneys, Bureau
of Internal Revenue.

By/s/ EUGENE HARPOLE.

4/19/50

No. 12520.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FLO PARKER AND ELGIN R. PARKER,

Appellants,

vs.

HARRY C. WESTOVER, Individually and as Collector of Internal Revenue for the Sixth District of California,

Appellee.

On Appeal From the United States District Court for the Southern District of California Central Division

BRIEF FOR THE APPELLANTS.

FILED

SEP 20 1950

PAUL F. O'BRIEN, CLERK

MELVIN D. WILSON,
819 Title Insurance Building, Los Angeles 13,
Attorney for the Appellants.

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No. 12520.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FLO PARKER AND ELGIN R. PARKER,

Appellants,

vs.

HARRY C. WESTOVER, Individually and as Collector of Internal Revenue for the Sixth District of California,

Appellee.

BRIEF FOR THE APPELLANTS.

Judgments Below.

The consolidated cases were tried before a jury, and verdicts were rendered for appellee [R. 34] and judgments thereon were entered on January 12, 1950. [R. 39.] No opinions were written.

Jurisdiction.

These proceedings involve suits for recovery of Federal individual income taxes for the calendar year 1944, in the amounts of \$63,477.71 and \$63,509.01 for Flo Parker and Elgin R. Parker respectively, plus interest thereon at six per cent (6%) per annum from the respective dates of payment of said sums to the appellee. [R. 9 and 24.]

Appellants are husband and wife and live at 120 South Burris Street, Compton, California. [R. 2, 10, 16, 17, 25.]

On March 15, 1945, appellants filed with the appellee, the Collector of Internal Revenue for the Sixth District of California, their income tax returns for the calendar year 1944. On July 9, 1947, appellants received from the appellee as Collector of Internal Revenue, notices and demands for payment of additional 1944 income taxes, plus interest as follows:

	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
Flo Parker	\$55,562.19	\$7,665.30	\$63,227.49
Elgin R. Parker	55,589.70	7,666.19	63,255.89
[R. 3, 11, 17, 25, 26.]			

Appellants paid to appellee as Collector of Internal Revenue said taxes and interest demanded by appellee as follows:

	<u>Tax</u>	<u>Interest</u>	<u>Total</u>
Flo Parker 7-12-47	\$27,590.01	\$3,749.20	\$31,339.21
Flo Parker 8-8-47	27,972.18	4,166.32	32,138.50
Total	\$55,562.19	\$7,915.52	\$63,477.71
Elgin R. Parker	\$27,617.52	\$3,752.99	\$31,370.51
Elgin R. Parker	27,972.18	4,166.32	32,138.50
Total	\$55,589.70	\$7,919.31	\$63,509.01
[R. 3, 11, 18, 26.]			

On January 23, 1948, appellants filed with appellee, claims for refund of 1944 federal income taxes in the respective amounts of \$55,562.19 and \$55,589.70 and interest paid thereon. The grounds of the claims were the same as those set out in the complaints subsequently filed. [R. 4, 18, 11, 26.]

Neither the appellee nor the Commissioner of Internal Revenue audited appellants' claims within six months of their filing, and appellants brought suits against appellee in the United States District Court for the Southern District of California, Central Division. Jurisdiction was conferred on such Court by Section 3772 of the Internal Revenue Code.

Judgments were entered in favor of appellee and against appellants on January 12, 1950. [R. 39.]

Within sixty days and on February 9, 1950, Notice of Appeal and Cash Bond were filed with the Clerk of the District Court, Southern District of California, Central Division. [R. 40, 41.] On March 27 and 28, 1950, Statement of Points Relied on and Designation of Portions of Record on Appeal were filed with said clerk. [R. 42, 43, 44.]

Jurisdiction is conferred on your Honorable Court by Section 1291 of Title 28 of the United States Code.

Statement of the Case.

These proceedings are appeals from the verdicts of the jury and judgments of the District Court of the United States, Southern District of California, Central Division, which determined that appellants were taxable on all the income of the partnership called Southern Heater Company for the fiscal year ended October 31, 1944, and that their children were not to be recognized as partners for Federal Income tax purposes, and that the appellants were not entitled to refunds of individual income taxes for the calendar year 1944 in any amount.

The question for review is whether the four children of appellants are to be recognized as partners for income

tax purposes, for the fiscal year of the partnership ended October 31, 1944, or whether the children are to be ignored as partners so that the appellants would be taxable on all the income of the partnership.

The entire record in condensed form has been brought up for review.

As of October 31, 1943, appellants each owned as their separate property [R. 47, 71], a half interest in the assets and business of a partnership known as Southern Heater Company. Elgin R. Parker managed that business and took a salary of \$12,000.00 a year from it. Flo Parker did not work in that partnership nor did she sign checks for the partnership. That firm was dissolved in November of 1943. [R. 47, 60.]

On October 31, 1943, each appellant gave to each of his or her four children, a six and one-quarter per cent ($6\frac{1}{4}\%$) interest in a business known as the Southern Heater Company. [R. 47.] The gifts were represented by deeds which were executed by appellants in the proper manner and immediately recorded in the office of the County Recorder, Los Angeles County. [R. 67 to 71, incl.] Such gifts were absolute and unconditional. [R. 48.]

The purpose of appellants in making these gifts was to try to tie the children into the business so that the family would be kept together and the business would be continuous. Furthermore, the appellants had been in bankruptcy before and they wanted the children to have some assets and income of their own, for their protection. [R. 47, 59.]

The appellants went into bankruptcy in 1936 due mostly to real estate investments and foreclosures of mortgages and deficiency judgments. Thereafter they acquired the

new business by saving some of Mr. Parker's salary and by receipt of a gift from a brother-in-law and sister. [R. 46.]

Appellants' four children were Dian, born in 1920; Patricia, born in 1932; Roland, born in 1937, and Arthur, born in 1940. [R. 46, 47.]

Appellants decided to make the gifts to the children and take the children into partnership before they talked to their accounting or legal or tax advisors. Upon talking to such advisors, they were advised that if they made the transfers unconditionally, and took an adequate salary for the services of the parents, and the rights of the children as partners were fully recognized and protected, the children should be recognized as partners for income tax purposes and be taxable on their own share of the income [R. 52, 53, 54, 57], but that the Commissioner of Internal Revenue would probably contend that the children should be ignored as partners. Thereafter, they went ahead with the transaction.

Before the gifts were made and before the partnership was entered into, Elgin R. Parker realized that the proposed transaction might result in a saving of income taxes for the family. [R. 58.] Flo Parker never realized that there were any possible income tax savings involved in the transactions. [R. 59, 60.]

After making the gifts, Elgin R. Parker applied to the Superior Court of the county in which they were living for appointment as guardian of the properties of the children, so that the children would have someone to look after the assets, under the supervision of the Court. [R. 47.] The Superior Court in Orange County in Docket Number A-11392, appointed Elgin R. Parker guardian,

provided he file four corporate surety bonds of \$23,000.00 each. [R. 78.] Several surety companies were approached but they declined to go on the bonds in view of the hazards of the business and the danger that, if at the maturity of the children, the business had operated at a loss, the children would sue the guardian and his surety for recoupment. Eventually a surety company was found which stated that it would go on the bonds of the guardian provided he obtain orders of the Court—(1) instructing the guardian to enter into a partnership agreement with the other owners of the business, and (2) instructing the guardian to keep the property of the wards invested in the partnership interests, and (3) give the guardian authority as partner to retain in the partnership some of the income of the business if it were not all distributed. [R. 48.] Accordingly, Elgin R. Parker applied to the Court for these instructions and obtained such instructions so that he was able to meet the requirements of the surety company. [R. 47, 48, 73, 78.]

Eventually the bonds were written and filed [R. 67], whereupon Elgin R. Parker was appointed guardian and Letters of Guardianship were issued. [R. 78; F and G.]

Articles of Co-partnership were prepared and presented to the Court and approved and signed by the appellants for themselves and Elgin R. Parker as guardian for the four children. [R. 78; D and E.] The partnership agreements took effect as of November 1, 1943. [R. 82-89; Exhibit 4.] The Articles of Co-partnership were amended on July 7, 1945, and May 24, 1946, the principal amendment being to reduce Elgin R. Parker's salary to \$2,400.00 per year when the active business assets of the partnership were transferred to corporations whose stock was owned by the partnership. [R. 92.]

Under California law, each partner had an equal voice in the management of the business and hence, the Superior Court had four votes against two for the appellants. [R. 82 to 89, incl.; Section 15018(e) of California Corporations Code (Partnerships).]

Since November 1, 1943, the guardian has filed annual accounts with the Court and had such accounts approved, and has operated and managed the guardianship estates and the partnership, under the supervision and jurisdiction and under the orders of the Probate Court. [R. 79, 80, 109; Defendant's Exhibit A; R. 108, 120, 121.]

The partnership filed certificates of fictitious firm name in the offices required by the California law. [R. 92, Exhibit 7.]

The business of the partnership grew after November 1, 1943, and most of the earnings were retained to carry on the expanded business. [R. 57.] In the fall of 1945, however, there was a distribution to each guardianship estate of \$3,750.00 over and above the amount necessary to pay income taxes, which sum was invested in United States Government Bonds and held by the guardian for the several guardianship estates. [R. 53, 98.]

As of May 1, 1946, most of the personal property of the business was transferred to two corporations and the stocks of the corporations were issued to the partnership. [R. 92; Exhibit 10; R. 108, 109, Nos. 3 and 4.] The Articles of Co-partnership were amended May 24, 1946, to provide that the partnership should not carry on the business of manufacturing and selling water heaters or brass specialties since the corporations had taken over the operation of these businesses. [R. 92, Exhibit 10.] From May 1, 1946, until September 1, 1948, the operations of the

partnership consisted solely of rental of real estate and holding of capital stock. On September 1, 1948, the real estate was transferred to another corporation which issued its stock to the partnership. [R 121; Nos. 9 and 10.] From September 1, 1948, until October 31, 1948, the operation of the partnership consisted solely of holding capital stock.

The partnership was dissolved as of October 31, 1948, and each guardianship estate received its share of the assets, which amounted to \$84,589.92 for each guardianship. [R. 49, 92; No. 12; 93-97, incl., 98.]

The appellants continued to support their children after November 1, 1943, and none of the earnings of the children have been used for their support or for that of the parents. [R. 48.]

The guardianships have not sold any property to the appellants nor have the guardianships suffered any losses. The guardianships have expended money for income taxes and premium on bonds and attorneys' fees. [R. 48.]

The original combined gift to each child on October 31, 1943, had a book value of \$24,745.98. [R. 5, 12; 19, 20, 27.] As of October 31, 1948, when the partnership was dissolved, each guardianship received assets from the partnership with a book value of \$84,589.92 and in addition had \$3,750.00 in United States Government Bonds or a total of \$88,339.92. [R. 49, 98, 100.] These assets are held in the guardianships and will be distributed to the children when they become of age.

The appellants filed Federal and State gift tax returns for the calendar year 1943 and reported the gifts to the children of the interests in the business, totalling \$98,-984.90. Appellants paid the Federal and State gift taxes

shown to be due. [R. 5, 12, 19, 20, 27.] Subsequently, the Commissioner of Internal Revenue determined that the transfers were complete and irrevocable and constituted taxable gifts, and determined the value of the gifts to be \$212,500.00 and determined that deficiencies in gift taxes were due. Appellants paid the additional Federal gift taxes totalling \$16,035.00. In arriving at the above values for gift tax purposes, the Commissioner of Internal Revenue, in valuing the goodwill of the business, used a salary of \$12,000.00 for Mr. Parker in computing the past earnings and in estimating the future earnings of the partnership. [R. 5, 12, 20, 27.] The Commissioner has not refunded said gift taxes. [R. 48.]

The income of the partnership for the fiscal year ended October 31, 1944, after paying a salary of \$12,000.00 to Mr. Parker, was approximately \$252,000.00. Appellants were entitled to fifty per cent (50%) thereof or \$126,000.00 plus the \$12,000.00 salary, making their total share \$138,000.00. After the Commissioner of Internal Revenue disregarded the children as partners, he demanded a total tax from appellants of \$193,000.00. This was \$55,000.00 more than appellants had a right to receive from the partnership for the year 1944. Under the Commissioner's ruling the children would receive \$126,000.00 from the partnership, free from income tax. [R. 49.]

As a result of the above situation, appellants filed an application to the Superior Court to adjust the division of the partnership income. [R. 49.] The petition asked that the Court authorize the appellants to take or use the

refunds of Federal income tax which would be paid to the children for the year 1944 upon the following conditions:

(1) If appellants won their income tax cases, they would return the refunds to the children, with the interest benefits that had been received.

(2) If appellants lost their income tax cases, they would keep the children's refunds and be free to apply to the Court for a further adjustment of the partnership income on account of the income tax situation. This application covered Federal income taxes as well as California income taxes. [R. 101 to 104, incl.] The Court granted the petition. [R. 105 to 107, incl.] This petition and order superseded an earlier petition for an adjustment for taxes which the Court did not act upon. In that earlier petition appellants asked that the income of the partnership, after the total family income taxes on the partnership income had been deducted, be divided in accordance with the interest of the partners; that is, fifty per cent to the appellants and fifty per cent to the children. [R. 110 to 116, incl.]

The salary paid to Elgin R. Parker for the fiscal year ended October 31, 1944, was arrived at after checking with various officials of different companies as to what they were receiving for like work, and taking into consideration the fact that Mr. Parker was getting \$12,000.00 per year from the previous partnership with his wife, and the fact that he had never before received a salary in excess of \$12,000.00 from any employer. The \$12,000.00 salary was about twice as much as any other executive of the partnership received. The certified public accountant who served the business had access to other concerns and he thought that \$12,000.00 would be a fair salary for the services of Elgin R. Parker. It was intended to be

a full and adequate salary for the services rendered to the partnership by Elgin R. Parker. [R. 50, 51.]

The business of the partnership increased in the fiscal year ended October 31, 1944, and the income for that year was produced by the existence of the plant, the capital, the going organization and the ability or good luck in getting allocations of materials to manufacture water heaters, and, of course, labor and management. [R. 50.] As of October 31, 1943, the business was being run on a three months' basis; that is, when an allocation of material was received, the management could set up a program for three months. Beyond that it could not determine what the future would be. This made it uncertain as to whether the company could stay in the water heater manufacturing business, as water heaters were not considered essential, and the company might not get further allocations of materials. Under these facts the appellants did not know as of October 31, 1943, whether or not they would make a profit. [R. 50.]

Appellants intended that the gifts to the children be genuine, complete and unconditional and intended to enter into *bona fide* partnership between themselves and the children and intended, in good faith, to conduct the business of the Southern Heater Company in partnership with the children. [R. 48, 51.]

All of the important steps taken after the formation of the partnership were taken after Elgin R. Parker had applied to the Court for instructions and had received his instructions on the contemplated steps. This included the transfer on May 1, 1946 and September 1, 1948, of some of the partnership assets into several corporations

and the issuance of the corporate stocks to the partnership. [R. 51.]

After appellants gave a half interest in the assets and business to their children, the income of the appellants was cut in half and the ownership of their assets was cut in half. Their living expenses went on as before, except that the appellants had to pay for them out of half of the income they formerly had. [R. 51.]

The net income of the business prior and subsequent to forming the partnership was approximately as follows:

1940	\$ 22,500.00
1941	60,000.00
1942	93,000.00
The period of Jan. 1. 1943 to October 31, 1943	140,160.00
Fiscal year ended October 31, 1944	260,576.89
1945	231,137.16
1946	306,050.28 [R. 52]

Neither the children nor Flo Parker contributed any services to the partnership at any time. [R. 54.] Flo Parker did not sign checks or render any service to the partnership. [R. 59.]

The Commissioner of Internal Revenue refunded the 1944 income tax that each child paid, in the approximate amount of \$13,986.09 with interest. [R. 67.] With the approval of the Superior Court, the appellants used these refunds to help pay their additional taxes for 1944. [R. 105 to 107, incl.]

Capital, both tangible and intangible, were material income producing factors and the children owned half of the tangible and intangible capital. [R. 50, 5, 12, 20, 27.]

The salary of \$12,000.00 per year paid to Elgin R. Parker by the partnership for the fiscal year ended October 31, 1944, was equal to the value of his services rendered to the partnership for that year. [R. 50, 51, 62, 63.]

The partnership with the children, as shown throughout the record, was created with all legal formalities and was held out as a partnership in all dealings with the tax authorities, the surety company, the probate court and the creditors.

The children reported their shares of the partnership income in their individual returns and paid taxes thereon. [R. 67, 97.] The partnership was legal under California law. The partnership filed Federal and State income tax returns as a partnership. [R. 52, 97.] This was a partnership for common law purposes.

The children, through the Probate Court, exercised dominion and control over their interest in the partnership business, they enjoyed their share of the earnings and they contributed capital to the partnership, which capital was material and income producing.

The gifts and formation of the partnership were consummated for a business purpose. The possible saving of income tax was not known to Flo Parker and was only an incidental object to Elgin R. Parker in making the gift.

Statute and Regulations Involved.

Section 181 of the Internal Revenue Code provides as follows:

“Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.”

Section 182 of the Internal Revenue Code provides:

“In computing the net income of each partner, he shall include, whether or not distribution is made to him—(a) As part of his gains and losses from sales or exchanges of capital assets held for not more than six months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for not more than six months. (b) As part of his gains and losses from sales or exchanges of capital assets held for more than six months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than six months. (c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in Section 183(b).”

Section 3797(a)(2) of the Internal Revenue Code defines partnerships and partners as follows:

“The term ‘partnership’ includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust

or estate or a corporation; and the term 'partner' includes a member in such a syndicate, group, pool, joint venture, or organization."

The Regulations do not add anything to the above provisions.

Statement of Points Relied On.

Appellants rely upon the following specified errors in their prosecution of these appeals:

1. The Court erred in failing to give the appellants' requested instructions Nos. 24, A, C, L and appellants took exception thereto.

2. The Court erred in giving appellee's requested instruction, No. 31, over the objection and exception of the appellants.

3. The Court erred in admitting, over appellants' objection, Memorandum *in re* Incidence of Federal Tax Liability on 1944 Partnership Income.

4. The Court erred in admitting, over appellants' objection, Application for Authority to Compromise Claims (6 pages) (Filed August 27, 1946).

5. The evidence is insufficient to justify the verdicts of the jury. [R. 42.]

ARGUMENT.

I.

Summary of Argument.

The Court's refusal to give the appellants' requested instructions to the effect that an intra-family gift of an interest in a business could be sufficient to constitute the donees partners for income tax purposes, lead the jury to the conclusion that the children's contribution in the case at bar was not sufficient to support a verdict that they could be recognized as partners for income tax purposes. The direct result of the Court's rulings and failures to give rulings, was that the jury thought there had to be original contributions of capital to the partnership by the new members, contrary to the principles laid down by the Supreme Court in *Commissioner v. Culbertson*, 337 U. S. 733.

If the Court had properly instructed the jury and had told it in affirmative language that the intra-family gift to the children, of interests in the business was sufficient to support a finding that the children could be valid partners, the jury would have found for the appellants.

The giving of the appellee's requested instruction No. 31 over the objection and exception of the appellants, gave the jury the impression that because the parents gave interests in the business to their children, the parents were necessarily taxable thereon, contrary to the principle set forth in *Commissioner v. Culbertson, supra*.

The Court's error in admitting over appellants' objection, "Memorandum *in re* Incidence of Federal Income Tax Liability on 1944 Partnership Income," raised doubt

in the minds of the jury as to whether the \$12,000.00 salary paid by the partnership to Elgin R. Parker was sufficient to fully compensate him for the services rendered to the partnership. There was no other evidence raising such doubt. This gave appellee a chance to argue that if Parker's services were worth more than \$12,000.00 per year, it would mean that some of the value of his services, which should have been reported on the appellants' returns, was reported on the returns of the children.

The Court's error in admitting over appellants' objection, "Application for Authority to Compromise Claims," filed August 27, 1946, gave the jury the impression that the appellants were acting as opportunists in prosecuting their suits for refunds, inasmuch as E. R. Parker, in said application recited that the law of family partnerships was greatly in favor of the Government. Actually, by the time of the trial, January, 1950, the law had greatly changed, due to the Supreme Court's decision (June 27, 1949), in *Commissioner v. Culbertson, supra*. In any event, the Application for Authority to Compromise Claims contained a layman's opinion as to this matter of law, which, of course, should not be admitted in evidence as an admission against interest or in any manner reduce his chances of success.

The evidence was wholly insufficient to support the implied finding of the jury that the partnership with the children was a sham and was not entered into for the *bona fide* purpose of carrying on the business in partnership form.

II.

The Effect of the Court's Rulings on Instructions to the Jury Was to Give the Jury the Erroneous Impression That Original Capital Contributions to the Partnership Were Necessary, and That the Gifts to the Children of Interests in the Business Were Not Sufficient to Support a Finding That the Children Could Be Bona Fide Partners for Tax Purposes.

In *Commissioner v. Culbertson*, 337 U. S. 733, the Supreme Court granted certiorari to consider the Commissioner's claim that the principles of *Commissioner v. Tower*, 327 U. S. 280, and *Lusthaus v. Commissioner*, 327 U. S. 293, had been departed from in the *Culbertson* case and other Courts of Appeal decisions. The Supreme Court in *Commissioner v. Culbertson*, *supra*, said that the Tax Court had read the *Commissioner v. Tower*, *supra*, and the *Lusthaus v. Commissioner*, *supra*, decisions as setting out two essential tests of partnership for income tax purposes: that each partner contribute to the partnership either (1) vital services or (2) capital originating with him. The Supreme Court said that the Tax Court had found sanction for the use of these "tests" of partnership from certain language in the *Tower* case. In *Commissioner v. Culbertson*, *supra*, it was the Commissioner's contention that the Tax Court's decision (in favor of the Government) could and should be reinstated upon the mere reaffirmation of the quoted paragraphs. The Court then turned to a consideration of the Tax Court's approach to the family partnership problem wherein the Tax Court treated as essential to membership

in a family partnership for tax purposes, the contribution of either vital services or original capital. The Court said:

“The use of these ‘tests’ of partnership indicates, at best, an error in emphasis. It ignores what we said is the ultimate question for decision, namely, ‘whether the partnership is real within the meaning of the Federal Revenue Laws’ and makes decisive what we described as ‘circumstances (to be taken) into consideration’ in making that determination.”

The Supreme Court then said that *Commissioner v. Tower, supra*, provides no support for such an approach as the Tax Court took.

The Supreme Court said:

“The Tax Court’s isolation of ‘original capital’ as an essential of membership in a family partnership also indicates an erroneous reading of the Tower opinion. We did not say that the donee of an intra-family gift could never become a partner through investment of capital in the family partnership, any more than we said that all family trusts are invalid for tax purposes in *Helvering v. Clifford*, 309 U. S. 331. The facts may indicate, on the contrary, that the amount thus contributed and the income therefrom should be considered the property of the donee for tax, as well as general law, purposes.”

Later the Supreme Court in *Commissioner v. Culbertson, supra*, said:

“If the donee of property who then invests it in the family partnership exercises dominion and control over that property—and through that control influences the conduct of the partnership and the disposition of its income—he may well be a true

partner. Whether he is free to, and does, enjoy the fruits of the partnership is strongly indicative of the reality of his participation in the enterprise.”

In that view of the law, the appellants requested the Judge in the case at bar to make the following instructions:

“No. 24. One of the elements that you may consider in determining the validity of this partnership is the capital that was put into the business. You may consider the source of the capital of the partners and the fact that the capital of the children was given to them by their parents. A parent can make a gift of property to his children, which is valid under the laws of California, and an outright gift carries with it the absolute parting with the control and dominion of the thing that is given, so that the donee or the party receiving the gift is absolutely free of his own will to do whatever the donee might desire to do with the property. You may consider whether the gifts in this case were absolute or subject to some condition or control by the parents.

“The fact that the children’s share of the partnership was given to them by their parents would not prevent the partnership from being valid for income tax purposes, if the gift were complete and the partners really intended to form a genuine partnership. *Thomas vs. Feldman*, 158 Fed. (2d) 488. *Armstrong vs. Commissioner*, 143 Fed. (2d) 700.

“No. A. It is the law that the donee of an intra-family gift can become a partner for Federal income tax purposes through investment of the capital in the family partnership. *Commissioner vs. Culbertson*, 69 Supreme Court 1210.

“No. C. You are instructed that if you believe from a preponderance of the evidence that the plain-

tiffs here gave interests in the business assets to their children, absolutely and unconditionally, and that thereafter the parents' economic situation was reduced by the capital they gave the children, and the income therefrom, and that the parents intended in good faith to have a bona fide partnership between themselves and the children for the operation of the business, then your verdict shall be for the plaintiffs. *Commissioner vs. Culbertson*, 69 Supreme Court 1210.

"No. L. The fact that transfers to members of the family group may be mere camouflage does not, however, mean that they invariably are. If the donee of property invests it in the family partnership and exercises dominion and control over that property—and through that control influences the conduct of the partnership and the disposition of its income—he may well be a true partner. Whether he is free to, and does, enjoy the fruits of the partnership is strongly indicative of the reality of his participation in the enterprise. *Commissioner vs. Culbertson*, 69 Supreme Court 1210." [R. 31 to 33, incl.]

Appellants took exception to the Court's refusal to give the requested instructions. This matter appears on page 157 of the Record and is as follows:

"Mr. Wilson: Thank you. I except to the omission of our requested instruction No. 24. [157]

The Court: An exception to the court's refusal to give plaintiffs' requested instruction 24 will be noted. I want to call your attention to the fact that everything requested in your instruction 24 was covered by the court's instruction. This instruction is argu-

mentative in form and it emphasizes certain facts in this case which the court has purposely avoided doing.

Mr. Wilson: And No. A in the supplemental is the next one.

The Court: Exception noted. I considered that as being covered.

Mr. Wilson: And No. C, your Honor.

The Court: Exception noted.

Requested instruction L, I gave in part.

Mr. Wilson: Only the first part, your Honor.

The Court: Yes, the last part I omitted, and an exception will be noted. [188]"

Attention is called to the fact that the counsel for the respective parties had filed requests for instructions prior to the trial and had met in the Judge's chambers and discussed the instructions with the Judge, with the result that the Judge knew the views of counsel with respect to the law of family partnerships and particularly the view of appellants' counsel with respect to donated property being the donee's contribution to the partnership. Hence, it was unnecessary for appellants' counsel to dwell on the grounds for his exception, since these were well known to the Judge and the Judge's views on this subject known to counsel.

Now those requested instructions of the appellants were directly in line with the language used by the Supreme Court in the *Commissioner v. Culbertson, supra*, and should have been given to the jury as nearly as possible in the Supreme Court's language.

Now did the Court instruct the jury that it was not necessary for the children to contribute original capital to the partnership? On page 145 of the Record the Court said:

“A gift of an interest in a family business, whether absolute or in trust, which makes no real change in the economic situation of the group or in the control or management of the business, will not reduce the obligations of the donor to account for and pay income tax on the earnings of the enterprise to the same extent as before the gift was made.”

On pages 146 and 147 of the Record the Court said:

“In considering whether or not the partnership with the minor children is of sufficient substance to justify the splitting of the income of the business for Federal Income Tax purposes, you may do so with the realization that the relationship between members of a family often makes it possible for one of the members to shift tax incidence by surface changes of ownership without disturbing in the least his dominion and control over the subject of the gift for the purposes for which the income from the property is used. He is able, in other words, to retain the substance of full enjoyment of all the rights which he had previously in the property.”

On page 147 the Court said:

“The fact that transfers to members of the family group may be mere camouflage does not, however, mean that they invariably are.”

On page 149 the Court said:

“The transactions between the plaintiffs and their minor children should be carefully scrutinized by you and if you determine from all the facts that the plain-

tiffs were able to retain the substance of all the rights which previously they had in the Southern Heater Company then you must determine that there was no valid partnership between the plaintiffs and their minor children for Federal income tax purposes during the year 1944.”

The Court did not give the affirmative phase of the rule that donated capital could be sufficient.

As shown on page 158 of the Record, appellants took exception to the giving by the Judge of appellee’s instruction No. 31. The Record, page 158, reads:

“Mr. Wilson: Then No. 31. I except to defendant’s No. 31, your Honor, as applied to this case.

The Court: What is that instruction?

Mr. Wilson: The one starting:

‘You are instructed that common understanding and experience are the touchstones for the interpretation of the revenue laws. The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid. The one who earns income but gives the right to receive that income to a favorite child has enjoyed the benefit of that income within the meaning of the Internal [189] Revenue laws.’

I think that ignores the property element, the ownership of property, and the fact that the property can earn income.

The Court: I feel I covered that pretty well. I do not think I have unduly stressed the conflicting theories of either party. Exception will be noted.”

Appellee's requested instruction No. 31, which the Court gave to the jury, read:

"You are instructed that common understanding and experience are the touchstones for the interpretation of the revenue laws. The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid. The one who earns income but gives the right to receive that income to a favorite child has enjoyed the benefit of that income within the meaning of the Internal Revenue Laws. *Helvering vs. Horst* (1940), 311 U. S. 112; Section 22(a) of the Internal Revenue Code."

After the Court had given its original instructions and the appellants had taken exception to refusal to give the requested instructions, Nos. 24, A, C and L, and had taken exception to the giving of appellee's instruction No. 31, the jury retired and considered the matter for several hours. Then they came back to the court room and asked several questions. One of them was as follows:

"Was the gift taken from the business and reinvested in the business considered a contribution to the welfare of the business?" [R. 158-B.]

They also asked for the definition of a partnership under the federal law and asked the Judge to reread the Instructions to the Jury with regard to family partnerships. [R. 158-B.]

The Court then read at least some of the instructions with regard to family partnerships but did not answer their question as to whether the gift taken from the business and reinvested in the business could be considered a contribution to the welfare of the business. The Court read again the negative statement with respect to a gift

of an interest in a family business which is quoted on page 23 hereof. He did not give the jury the very information they were seeking; namely, the Supreme Court language with respect to original capital and with respect to gifts of interests in the business, which language appellants had requested the Judge to give and had taken an exception when he refused to do so.

Immediately upon the Judge repeating his negative instructions with respect to the gift, the jury went back to the jury room and unanimously voted against the appellants.

It was obvious to the Judge and counsel, that the jury was in doubt as to whether the children's contribution of capital had to be "original," or whether it could consist of interests in the existing business assets. It was also obvious that his original instructions had not cleared up the point, and that a re-reading of his original instructions would not remove the doubt.

Now the Judge knew what the Supreme Court in the *Culbertson* case said on the subject, because appellants had requested an instruction on the point, giving the *Culbertson* case as authority, and had taken an exception to the Judge's refusal to so instruct.

In *Cyclopedia of Federal Procedure*, Volume 7, page 641, the pertinent rule is stated as follows:

"In giving additional instructions, the doubt which the jury manifests should be met by a charge tending to avert an error in that direction."

The Judge did not give them the instruction which had been requested by appellants and by the jury itself, and thus committed an error in the most critical point of the case. In effect, the Judge left a *legal* question to the de-

cision of the jury, which is clearly erroneous. (64 Corpus Juris 584.)

Not only did the Judge refuse to give the appellants' requested instructions as indicated above, which lead the jury to the conclusion that contributions by the new partners had to be original contributions and an increment in the capital of the business, but he also gave instruction No. 31 over appellants' objections and exceptions, and it read as follows:

"You are instructed that common understanding and experience are the touchstones for the interpretation of the revenue laws. The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid. The one who earns income but gives the right to receive that income to a favorite child has enjoyed the benefit of that income within the meaning of the Internal Revenue Laws."

The jury's obvious conclusion from the instructions of the Judge, was that since the parents had originally owned the capital and given an interest in it to the children, they were the ones who earned or created the right to the income from that property and were taxable on it even though they had given the income producing property to the children. This is contrary to the law as set forth by the Supreme Court in *Commissioner v. Culbertson, supra*, which says that an inter-family gift of an interest in the business can support a recognition of the donee as a partner.

In contrast to the instructions concerning these points as given by the Court below with the instructions given in other family partnership jury cases, please observe the

instructions of the Court in a number of other cases set out below:

In *C. B. Fretwell v. Bowers*, U. S. District Court, Eastern District of South Carolina, Columbia Division, reported August 2, 1950, paragraph 72,685, 1950 Prentice-Hall Federal Tax Service, the jury upheld a family partnership consisting of the husband and wife and their adult son and trustee for a minor son. All but the husband made their contributions by gifts from other members of the family. The trial Judge, D. J. Timmerman, read the instructions requested by the respective counsel.

For the Government, he gave the instruction quoted on page 23 of this brief.

For the taxpayer, he gave an instruction as follows:

“6. Members of the same family, including husband, wife and children, and a trustee for a member of the family, may form a partnership which is entitled to be recognized as a real partnership under the Federal Income Tax Laws. A partnership within the meaning of the Federal Income Tax Laws may be formed as a result of a gift by one member of a family to another member of the family. The reality of such a partnership depends upon the intention of the parties, just as in the case of a partnership between persons who are not members of the same family.”

It will be noted that Judge Timmerman gave the affirmative as well as the negative instruction concerning a partnership based on a gift. In the *Parker* case, the Judge gave only the negative, which did not convey to the jury the law of the case, as enunciated by the Supreme Court.

Similarly, in *William M. Lamb v. Smith*, the United States Court of Appeals for the Third Circuit, on July 28, 1950, affirmed a judgment based on a verdict of the jury upholding a family partnership, in a trial in the United States District Court for the Eastern District of Pennsylvania. In the trial court, paragraph 72,395 of 1950 Prentice-Hall Federal Tax Service, the charge of the Court is shown. The Court instructed the jury as follows:

“If the donee of property—that is a person who is given property—then invests it in the family partnership, exercises dominion and control over that property, and through that control influences the conduct of the partnership and the disposition of his income, he may well be a true partner. Whether he is free to, and does, enjoy the fruits of the partnership is strongly indicative of the reality of his partnership in the enterprise.”

In *Mundo v. Thompson*, Paragraph 72,361 of 1950 Prentice-Hall Federal Tax Service, the jury in the United States District Court, Eastern District of Arkansas, Western Division, on November 1, 1949, upheld a family partnership, based in part on gifts to the new partner from the old one. The Court instructed the jury, in part, as follows:

“Such capital contributions may be considered, whether the capital originated from Thelma Mundo’s own funds or was received as a gift from plaintiff.”

Compare those instructions with appellants’ requested instructions, Nos. 24, A, C and L.

What a different imprint on the jury's mind the instructions in the cited cases make, as compared to the instructions given by the Court below.

In addition to the Court's refusal to give the appellants' requested instructions as to the efficacy of the gift as support for a family partnership, it might be interesting to note the general tenor of the Court's instructions with respect to other matters.

The Court, in its instructions, reminded the jury twice that there was a presumption that the Commissioner's determinations were correct. These reminders are found on the following pages of the record: 143 and 161.

Now when the jury came back into the courtroom and asked certain questions, they did not ask whether there was any presumption in favor of the determination of the Commissioner. Nevertheless the Court, in that brief interlude, and toward the close of the day and after the jury had been out several hours, incorrectly stated [p. 161 of the Record] that the jury had asked for certain instructions with reference to the findings of the Commissioner as being presumptively correct. The questions asked by the jury are shown on pages 158 and 159 of the Record and they certainly do not include such question. Nevertheless, the Court on page 161 raised that question and again reminded the jury that the action of the Commissioner was presumed to be correct.

The Judge should not have repeated that rule at that juncture of the trial. It was equivalent to telling the jury:

"You are obviously divided in your votes. The hour is growing late. When you can't unanimously agree to vote for the appellants, the presumption in favor of the defendant should give you your answer.

If you don't quickly decide on a verdict, you will be locked up by the bailiff."

In *Cyclopedia of Federal Procedure*, Volume 7, page 642, the rule is shown as follows:

"Instruction is properly limited to the questions asked by the Jury."

The Judge did not answer a critical question the jury asked, which if properly answered, would have benefited appellants, but instead, volunteered to repeat the "burden of proof on the plaintiff" rule, which aided the defendant. He also put pressure on them to quickly make a decision.

The appellants had already taken exception to the Judge's refusal to give appellants' instructions which would have directly cleared up the doubt in the jury's mind.

Again it might be interesting to find out how many times the Court instructed the jury that intra-family matters, particularly intra-family partnership matters, are subject to close scrutiny. Such instructions were given in the Record on the following pages: 145, 146, 147, 149, 159.

The rule on this point is stated in *Randall's Instructions to Juries*, Volume 1, Section 416, as follows:

"... if the frequent repetition of a phrase or a proposition of law is misleading, or is such as to give undue prominence to certain features of a case, to the prejudice of one party or the advantage of another, it will constitute reversible error."

The Judge's constant repetition on this point gave appellants about as much standing, in the eyes of the jury, as convicted subversives.

Again it may be interesting to see how many times the Court reminded the jury that the appellants had the burden of proof. These instructions are found in the Record on the following pages: Record 144, 152 and 161.

While the United States Code provides that there can be no jury trial in a case against the United States Government (for the obvious reason that every juror who is a taxpayer would feel like he was one of the defendants), the Judge on page 141 stated that these suits were in reality against the United States, since if the taxpayers, plaintiffs in this action, recovered the judgment, it must be paid from the treasury of the United States. The Government Attorney made much of this point in his argument. He told the jurors that if they approved this claim against the "club," each member, including themselves, would have his "dues" increased.

It is believed that the effect of the Judge's instructions and refusal to give instructions was to create in the minds of the jury the impression that to be valid for income tax purposes, there must have been some contribution of services or management or capital which would improve the condition of the partnership or the business. In other words, there must have been some purpose other than tax saving, and that purpose had to relate to the business and could not be an extraneous purpose, such as benefiting the donees.

On pages 148, 149, 160 and 161, the Court referred to a *business* purpose.

As a matter of law, the Supreme Court has merely said that the question is whether there was a genuine purpose to carry on the business in partnership form.

It is obvious from the question asked by the jury [R. 158-B] that they considered that a purpose which would support a recognition of the partnership must be a contribution "to the welfare of the business." The Judge refused to give the instructions requested by the appellants to the effect that a contribution of original capital by the new members was not necessary. It was only necessary that they control the income from the donated property and that donors and donees intended that they should operate the business as a partnership.

If the Court had given the instructions requested by the appellants, the jurors would not have insisted on a contribution of original capital by the children and would have found the partnership involved should be recognized for income tax purposes. That was the result in three recent cases, where proper instructions were given. (*C. B. Fretwell v. Bowers, supra*; *Lamb v. Smith, supra*, and *Mundo v. Thompson, supra*).

III.

The Court Erred in Admitting Over Appellants' Objections "Memorandum in re Incidence of Federal Tax Liability on 1944 Partnership Income."

The appellants introduced competent evidence to the effect that the \$12,000.00 salary which was paid by the partnership to Elgin R. Parker was adequate compensation for the services he rendered to the business for the fiscal year ended October 31, 1944.

The appellee introduced no evidence on this point, except that he introduced in evidence over appellants' objection, "Memorandum in re Incidence of Federal Tax Liability on 1944 Partnership Income."

The Record, pages 55 and 56, shows the trial on this point, as follows:

“Mr. Garland: May I now offer in evidence, the certification of some twenty-eight documents listed on the first page, being authenticated, and is substantially the entire file, as I understand, at least part of the file of the guardianship estates. I will introduce all these papers.

The Court: Any objection?

Mr. Wilson: I object to the one that he has been discussing, because it has a statement by Mr. Parker as to the status of the law on family partnerships, which is a matter of opinion and could not be taken as an admission of any kind by him. And also the same objection is made to the memorandum signed by myself. It states matters of opinion.

Mr. Garland: I have made my offer.

Mr. Wilson: To the rest of them I have no objection.

The Court: They will be introduced.

The Clerk: Defendant's Exhibit A in evidence.

(The documents referred to were marked Defendant's Exhibit A and were received in evidence.)”

[Testimony of Elgin R. Parker]:

“The Memorandum in re Incidence of Federal Income Taxation on Partnership Income signed by Melvin D. Wilson does not bear my signature. I authorized him to file papers on my behalf in the guardianship matter.

Mr. Garland: This memorandum is on page 2 of the Memorandum in re Incidence of Federal Income Tax Liability on 1944 partnership income: ‘The father received a salary of but \$12,000.00, whereas

his services were worth at least \$52,000.00 per year. If a fair and full salary of \$52,000.00 per year had been paid the father, a result more comparable to that shown in situation C would have obtained.”

This memorandum was filed with the Superior Court by appellants’ counsel without appellants’ knowledge and without any information or advice from them. It contained a statement by the counsel that Elgin R. Parker’s services were worth \$52,000.00 per year. This was an expression of opinion by a person not shown to be qualified as having a worthwhile opinion on this point and furthermore it was a statement of opinion and not a statement of fact. It was made without the appellants’ knowledge and without any information or advice having been given by them to their counsel on such point.

This matter was read to the jury and much was made of it in the argument by appellee’s attorney.

In 31 Corpus Juris Secundum, page 1025, the rule with respect to admissions against interests is as follows:

“To be competent as an admission, a statement must be one of fact, and a statement which is a mere opinion or conclusion or a conclusion of law is as a rule inadmissible.”

The Judge erred in admitting such a conclusion in evidence and erred in allowing it to be read and argued to the jury. This error of the Court and appellee’s argument based thereon, influenced the jury into thinking that perhaps Mr. Parker had not been fully compensated for his services to the partnership and that some of the income which should have been taxed in his returns, was taxed in the children’s returns. This constituted an error on a substantial point and is ground for reversal.

IV.

The Court Erred in Admitting Over Appellants' Objection, "Application for Authority to Compromise Claims," Filed August 27, 1946.

The Court admitted into evidence this Application for Authority to Compromise Claim found on pages 110 to 116 of the Record over the objection of the appellants. The jury took this exhibit and all others to the jury room and it is presumed that they read it and considered it.

That exhibit contained the following statement:

"It seems entirely probable that the claims of the Commissioner of Internal Revenue in this case will be sustained by the Tax Court and the other Courts of the United States and by the State tax authorities. Your petitioner and his wife will probably file protests and endeavor to effect some settlement and saving of tax but it appears that this is an undertaking with very little prospect of success." [R. 113.]

Appellants' objection to the admission of this statement is stated on page 55 of the record as follows:

"Mr. Garland: May I now offer it in evidence, the certification of some twenty-eight documents listed on the first page, being authenticated, and is substantially the entire file, as I understand, at least part of the file of the guardianship estate. I will introduce all these papers.

The Court: Any objection?

Mr. Wilson: I object to the one that he has been discussing, because it has a statement by Mr. Parker as to the status of the law on family partnerships, which is a matter of opinion and could not be taken as an admission of any kind by him. * * *

Mr. Garland: I have made my offer.

Mr. Wilson: To the rest of them I have no objection.

The Court: They will be introduced.

The Clerk: Defendant's Exhibit A in evidence.

(The documents referred to were marked Defendant's Exhibit A and were received in evidence.)"

Here again this was not a statement of fact but a mere conclusion and in addition was a conclusion of law, made by a layman.

Now it is clear from the authorities cited in 31 Corpus Juris Secundum, page 1025, that legal conclusions of the party are not admissible in evidence as admissions against him. This is true also when it involved matters of law and fact.

The statement made in this Application [R. 113] might easily lead the jury to believe that the prosecution of these suits by the appellants was entirely speculative and opportunistic. As a matter of law it is obvious, of course, that the decisions were for the most part against family partnerships, until the Supreme Court decision in *Commissioner v. Culbertson, supra*, which was handed down on June 27, 1949. That case recognized the principles for which the appellants have been contending from the beginning, but for a long time it did not seem that the courts were going to recognize the principles which the Supreme Court eventually held to be correct.

In any event, it was error for the Judge to admit this statement in evidence and it probably had a considerable influence on the jury. Therefore it constitutes reversible error.

V.

The Evidence Was Wholly Insufficient to Support the Implied Finding of the Jury That This Partnership Was a Sham and the Implied Finding That It Was Not Entered Into for the Purpose of Carrying on the Business as a Bona Fide Partnership.

Without an affirmative instruction from the Court that the contributions by the children to the partnership of interests in the business given to them by their parents, was sufficient for the recognition of them as partners for income tax purposes, the appellants never had a chance for a favorable verdict from the jury. Since the children did not contribute services nor original capital, their entire chance for recognition depended upon their ownership of a portion of the assets and their contribution of these assets to the partnership. Never once did the Court tell the jury in affirmative language that this contribution could be sufficient, if combined with other pertinent factors.

Appellants requested the Judge to make such an affirmative instruction and took exception when he refused to do so. When the jury came back into the court room the second time, the jury asked for an instruction on this specific point and again the Judge refused to give them one. Appellants had already taken exception to such refusal and, of course, did not consider it necessary to take another exception on the same point. The law does not require a person to perform a futile act.

Consequently, the keystone of appellants' case was removed by the Judge's faulty instructions and the jury reached an erroneous verdict. If the Judge had properly

instructed the jury along the lines indicated by the Supreme Court in *Commissioner v. Culbertson, supra*, it is believed that the jury would have found for the appellants. All the other elements necessary for recognition of the children as partners were present in this case, as will be outlined hereinafter.

The parents made complete, irrevocable and unconditional gifts of interests in the business to the children for reasons not concerned with tax avoidance. The deeds covering these gifts were acknowledged before a notary public and were recorded. They were reported to the Commissioner of Internal Revenue in gift tax returns and he determined that the gifts were valid, complete, unconditional and irrevocable and imposed taxes thereon. He not only imposed gift taxes on the transfer of the tangible property but additional gift tax on the intangible property of the business.

After the children became owners of interests in the assets and business, it was necessary for all the owners to form an organization to carry on the business. Appellants applied to the Superior Court in the county in which they resided, for the appointment of a guardian to look after the children's interests under the supervision of the Court. A guardian was appointed, provided he filed bonds. Before he could procure bonds he had to secure from the Court permission to keep the children's assets in the business, permission to sign the partnership agreement, approval of the partnership agreement and permission to retain some of the earnings in the business. Thereafter annual accounts were filed with, and approved by, the Court, and all important steps were presented to the Court and given its approval before they were made.

The children's earnings were credited to them and some distribution was made in 1945. In 1948 the partnership was dissolved and the children's greatly enhanced interests were distributed to their guardian.

The parents continued to support the children and none of the children's income was used for their support or for the support of the parents.

The children's Federal income tax refunds were loaned to the parents to enable them to pay their income tax deficiencies, upon the condition that if the parents won their income tax litigation they would return the refunds to the children with the interest benefits obtained, and if the parents lost their income tax litigation, they would keep the refunds and be free to ask the Court for a further adjustment. It had been indicated in an earlier application to the Court, which was not acted upon, that if the parents lost the income tax litigation they would probably ask the Court to approve a division of the income, after all income taxes of all the partners had been deducted, to the extent of 50% to the parents and 50% to the children. If the Probate Court approved this plan, it would still leave the children a very handsome income on their investment.

While Elgin R. Parker was appointed guardian, he was under the control of the Court and through this means the Court had four votes in all partnership matters as against two for the appellants. Section 15018(e) of California Corporations Code provides that "all partners have equal rights in the management and conduct of the partnership business." Consequently, the Court controlled the partnership and the business. The guardian took an oath to comply with the law and gave bond to do so.

The appellants actually gave up half of their capital and half of their income and hence their economic interests were greatly reduced.

The purpose of the transfer to the children was to interest them in the business so that it could be continued even after the death of the appellants and to give the children some property and income, in the event that disaster again befell the appellants, as it had once before. They decided to make these transfers to the children before they ever consulted tax, accounting or legal counsel. While Elgin R. Parker realized that the family income taxes would be reduced if the children were recognized as partners, Flo Parker did not realize this and hence, it had no part in the reasons and purposes for which she made the gift. Her half of the property was her separate property and she managed it herself, with her husband's assistance.

The partnership paid Elgin R. Parker the full value of his services rendered to the business in the year ended October 31, 1944. His salary was first established in November of 1942, when the partnership with his wife was made. At that time, \$12,000.00 per year was plainly adequate, considering the size of the business. Many cases dealing with reasonable compensation for income tax purposes, have established the principle that:

“Additional compensation during the war years may not have been justified where the circumstances disclose increased income without correspondingly increased work or activities of officer-stockholder.”
1950 Prentice-Hall Federal Tax Service, Paragraph 11,703 J, and cases digested at Paragraph 11,703 K.

In Regulation 111, Section 29.23(a)(6)(3), the following rule is laid down with respect to the determination of the reasonableness of salaries:

“The circumstances to be taken into consideration are those existing at the date when the contract for services was made, not those existing at the date when the contract is questioned.”

There was no evidence that E. R. Parker worked any harder in 1944 than he did in 1942. War housing called for more of his products, and he was fortunate in securing materials. The additional business just fell into his hands. Since Elgin R. Parker was adequately compensated for his services, and Flo Parker rendered no services to the business, none of the income which should have been reported in the returns of the parents was reported in the returns of the children.

The children owned half of the tangible and intangible capital of the business and this capital produced all of its net income, after deducting the salary to the father. The children owned a half interest in the business and a half interest in the net income and such income should not have been taxed to the parents.

The facts of this case meet all the tests laid down by the Supreme Court in *Commissioner v. Culbertson, supra*, wherein it said:

“The fact that transfers to members of the family group may be mere camouflage does not, however, mean that they invariably are. The Tower case recognized that one's participation in control and management of the business is a circumstance indicating an intent to be a bona fide partner despite the fact that the capital contributed originated elsewhere in

the family. If the donee of property who then invests it in the family partnership exercises dominion and control over that property—and through that control influences the conduct of the partnership and the disposition of its income—he may well be a true partner. Whether he is free to, and does, enjoy the fruits of the partnership is strongly indicative of the reality of his participation in the enterprise.”

The children in this case were donees of property and they invested it in the family partnership. Through the Superior Court they exercised dominion and control over their property, and in fact over the parents’ interest in the business, and through that control they influenced the conduct of the partnership and the disposition of its income. They received their shares of the income. They were intended to be and were true partners.

The Court further said in *Commissioner v. Culbertson*, *supra*:

“The facts may indicate, on the contrary, that the amount thus contributed and the income therefrom should be considered the property of the donee for tax, as well as general law, purposes.”

The parents completely gave away half of their property and the income therefrom. They no longer retained it. They put it as far from them as they could by putting it under the control of the Court and they gave it to the children and the children received it and kept it. The Court really dominated the business and its management. The property produced the income here involved, as the parents were fully paid for their services rendered to the company. The parents did not use any of the children’s income either for the support of the children or for the

parents and there has been no "Indian Gift" such as was present in the *Tower* and *Lusthaus* cases.

The fact that the parents borrowed the children's refunds, with the approval of the Probate Court, does not amount to a taking of some of the children's income or assets. It is to be returned, with interest, if the parents win their income tax case.

The possibility that the parents may keep the children's refunds of income tax, or may, with the Probate Court's approval, get even a greater adjustment from the children in the event the parents lose their income tax case, does not negate the bona fide intention to make the children partners or to make complete, unconditional gifts to the children. As to the children's refunds, they should rightfully be applied against the tax on the children's income, even though that tax will be assessed against appellants if they lose the income tax case. It is still a tax on income belonging to the children. If any additional allowance is made to the parents by the Probate Court, it would be because the tax *on the children's income* would, if the parents lose the income tax case, be larger than if assessed against the children. But the children would simply be *paying a larger tax on their own income*—not giving the parents anything.

In *William M. Lamb v. Francis R. Smith*, decided by the U. S. Court of Appeals for the Third Circuit, July 28, 1950, Paragraph 72,666 of 1950 Prentice-Hall Federal Tax Service, there was also an adjustment between the partners on account of additional income taxes paid by the husband—assessed because the wife and minor children were not treated by the Commissioner as partners. There the additional taxes against the family were paid

out of partnership income, thus reducing the distributive income of the wife and children, as well as the father. No doubt the father used the children's income tax refunds, also. Page 44a of Appendix to Brief for the Appellant in the above entitled case.

Nevertheless, the jury found the wife and minor children were partners, and the Appellate Court upheld the verdict.

In the case at bar, the children were the real owners, legal and equitable, of the property, tangible and intangible, which produced the income. They received that income, and through the Probate Court and the guardian they controlled the business. There is no sham and they should be recognized as partners.

The principles for which appellants are contending are well expressed and strongly supported by the Senate Committee on Finance, in its Report to accompany H. R. 8920, dated August 22, 1950, found in the Appendix to this brief. In the Appendix also appear the provisions of Section 222 of H. R. 8920.

If said Section 222 becomes law, it will dispose of this case, in favor of the appellants.

If, for any political or fiscal reason, the said section is deleted from the law, the views of the Committee still constitute a clear statement of the present law on the subject of family partnerships—with the fog of confused thinking cleared away—a statement by some of the ablest lawyers, and best students of taxation, in the Senate.

An outline of the Committee Report follows:

1. Income from property is taxable to the owner of the property.

2. Income from personal services is taxable to the person rendering the services.

3. There is no different rule applying to partnership income.

4. The Tax Court has incorrectly established a rule that an intrafamily gift of a partnership interest, when the donee performs no substantial services, cannot be the basis of a valid partnership for tax purposes.

5. The owner of an interest in a partnership is taxable on the income from that interest, however he may have acquired that interest.

6. Arrangements between family members should be closely scrutinized, to see if the transactions are real or sham.

7. If the ownership is real, it is immaterial that (1) the donor desired to save income taxes or (2) that the business did not benefit from the entrance of the new partner; a gift is not normally motivated by any business purpose.

8. If the apparent ownership is a sham, it will be disregarded.

9. True ownership by the donee need not be negated by substantial powers retained by the donor (1) as a managing partner, or (2) as a fiduciary, since these powers are to be exercised for the benefit of the donees and not for the donors.

10. The donor may not be taxed on the income from property truly given to another.

11. The value of personal services is to be taxed only to the partner performing them, and the income from property is to be taxed to the true owners.

12. The fact that a reallocation of the income between services and property is necessary, does not require the nonrecognition as a partner of a donee of property.

The facts in the case at bar fully meet all the tests set up by the Senate Committee. The facts also fully satisfy the tests made by the Supreme Court.

The appellants went all the way; they made complete gifts to their children, to benefit the children; they intended their children to be partners; they gave up all their legal and beneficial interest in and control over the property; they took an adequate salary for personal services rendered; they did not use or receive any of the children's income or property; the children have influenced the conduct of the business, through the Court and guardian, and have received and enjoyed their income and property. There is no sham, no under-the-table-strings, no "Indian Gift," no invisible control. The children are the real owners of the property and of the income, and no one but the children should be taxed thereon.

For decisions of the United States Circuit Courts of Appeal recognizing minor children as partners where the children rendered no services and made their contributions from capital donated by their partner-parents, see

Milton Greenberger v. Commissioner, 177 F. 2d 990, C. C. A. 7; *Thompson v. Rigg*, 175 F. 2d 81 (no petition for certiorari), C. C. A. 8; *Thomas v. Feldman*, 158 F. 2d 488, C. C. A. 5; *Armstrong v. Commissioner*, 143 F. 2d 760, C. C. A. 10 (no petition for certiorari); *Walsh v. Commissioner*, 170 F. 2d 535, C. C. A. 8. In at least two of the cases, *Milton Greenberger v. Commissioner*, *supra*, and *Thomas v. Feldman*, *supra*, the saving of income taxes was at least an incidental object of the gifts and the formation of the partnership. In one case, *Armstrong v. Commissioner*, *supra*, the father was sole trustee for the minor children and had broad powers. In two other cases, *Thompson v. Rigg*, *supra*, and *Thomas v. Feldman*, *supra*, the father was a trustee with others. In *Walsh v. Commissioner*, *supra*, there was a guardianship for a minor child and the father was the guardian. The guardian was the son of the prior owner of the business (the donor of the interest to the grandchildren).

If the jury in the case at bar had been properly instructed as to the law as indicated by the authorities cited in this brief—that minor children who contribute interests in the business which was donated to them by their parents, can be recognized as partners, even though the children render no services and tax saving was one of the objects of the gifts, if the gifts were genuine and complete and the children were the real owners of the interests, and the children were intended to be partners—the jury would undoubtedly have found for the appellants.

Conclusions.

Appellants contend that the verdicts and judgments were erroneous because of errors by the Court in its instructions, and because of the fact that the evidence does not support the implied findings of the jury that the partnership was a sham. The judgments below, therefore, should be reversed.

Dated at Los Angeles, California, this 15th day of September, 1950.

Respectfully submitted,

MELVIN D. WILSON,

Counsel for Appellants.

APPENDIX.

(110) Section 222 of H. R. 8920, on Family Partnerships states as follows:

“(a) Definition of Partner.—Section 3797(a)(2) is hereby amended by adding at the end thereof the following: ‘A person shall be recognized as a partner for income-tax purposes if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person.’

(b) Allocation of Family Partnership Income.—Supplement F of chapter 1 is hereby amended by adding at the end thereof the following new section:
‘Sec. 191. Family Partnerships.

‘In case of a family partnership, the allocation of partnership income according to the terms of the partnership agreement shall be recognized unless such allocation does not substantially reflect the proportionate value of the services or capital of the family members, taking into account the contribution of services and capital of each. If it does not so reflect the proportionate value of services, a reasonable proportionate allowance for such services shall be attributed to the partners rendering such services. The fact that a partner does not actively participate in the management or conduct of the partnership business shall be taken into account in determining the proportionate value of services and capital, but shall not otherwise affect his status as a partner. For the purpose of this section, the term “family partnership” shall mean any partnership as defined in section 3797(a)(2) which includes two or more members of the same family as defined in section 24(b)(2)(D), and for this purpose a

trust for the benefit of a member of a family shall be considered a member of such family.'

(c) Effective Date.—The amendments made by this section shall be applicable with respect to taxable years beginning after December 31, 1938."

Section XI(B)(4), pages 60 to 63, incl., of the Report of the Committee on Finance accompanying H. R. 8920 states as follows:

(4) FAMILY PARTNERSHIPS.

"Section 222 of your committee's bill is intended to harmonize the rules governing interests in the so-called 'family partnership' with those generally applicable to other forms of property or business. Two principles governing attribution of income have long been accepted as basic: (1) income from property is attributable to the owner of the property; (2) income from personal services is attributable to the person rendering the services. There is no reason for applying different principles to partnership income. If an individual makes a bona fide gift of real estate, or of a share of corporate stock, the rent or dividend income is taxable to the donee. Although there is no basis under existing statutes for any different treatment of partnership interests, recent judicial and administrative action in this field has ignored the principle that income from property is to be taxed to the owner of the property.

Many court decisions since the decision of the Supreme Court in *Commissioner v. Culbertson* (337 U. S. 733) have held invalid for tax purposes family partnerships which arose by virtue of a gift of a partnership interest from one member of a family to another, where the donee

performed no vital services for the partnerships. Some of these cases apparently proceed upon the theory that a partnership cannot be valid for tax purposes unless the intrafamily gift of capital is motivated by a desire to benefit the partnership business. Others seem to assume that a gift of a partnership interest is not complete because the donor contemplates the continued participation in the business of the donated capital. However, the consistency with which the Tax Court, since the Culbertson decision, has held invalid family partnerships based upon donations of capital, and the many reasons advanced in the opinions for such decisions would seem to indicate that, although the opinions often refer to 'intention,' 'business purpose,' 'reality,' and 'control,' they have in practical effect established a rule of law to the effect that an intrafamily gift of a partnership interest, where the donee performs no substantial services, cannot be the basis of a valid partnership for tax purposes. We are informed that the settlement of many cases in the field is being held up by the reliance of the field offices of the Bureau of Internal Revenue upon some such theory. Whether or not the opinion of the Supreme Court in *Commissioner v. Tower* (327 U. S. 280) and in the opinion of the Supreme Court in *Commissioner v. Culbertson* (337 U. S. 733) which attempted to explain the Tower decision, afford any justification for the confusion is not material—the confusion exists.

Your committee's amendment makes it clear that, however the owner of a partnership interest may have acquired such interest, the income is taxable to the owner, if he is the real owner. If the ownership is real, it does not matter what motivated the transfer to him or whether the business benefited from the entrance of the new part-

ner. The question of the taxability of the income of such interest depends, as in the case of any other donated property, on whether the donee is the real owner of the interest. The amendment is intended to make it clear that there is nothing peculiar in the tax law as applied to partnerships but, on the contrary, that they are governed by the ordinary rules which generally determine the person to whom income is to be taxed.

The amendment leaves the Commissioner and the courts free to inquire in any case whether the donee or purchaser actually owns the interest in the partnership which the transferor purports to have given or sold him. Cases will arise where the gift or sale is a mere sham. Other cases will arise where the transferor retains so many of the incidents of ownership that he will continue to be recognized as a substantial owner of the interest which he purports to have given away, as was held by the Supreme Court in an analogous trust situation involved in the case of *Helvering v. Clifford* (309 U. S. 351). The same standards apply in determining the bona fides of alleged family partnerships as in determining the bona fides of other transactions between family members. Transactions between persons in a close family group, whether or not involving partnership interests, afford much opportunity for deception and should be subject to close scrutiny. All the facts and circumstances at the time of the purported gift and during the periods preceding and following it may be taken into consideration in determining the bona fides or lack of bona fides of a purported gift or sale.

Not every restriction upon the complete and unfettered control by the donee of the property donated will be indicative of sham in the transaction. Contractual restric-

tions may be of the character incident to the normal relationships among partners. Substantial powers may be retained by the transferor as a managing partner or in any other fiduciary capacity which, when considered in the light of all the circumstances, will not indicate any lack of true ownership in the transferee. In weighing the effect of a retention of any power upon the bona fides of a purported gift or sale, a power exercisable for the benefit of others must be distinguished from a power vested in the transferor for his own benefit.

Your committee's amendment requires that a true partnership relation exist in that each partner must be a real owner of an interest in the enterprise, just as an alleged donee of any other property must actually own it if the income is to be taxable to him rather than to the donor. In the case of a transfer of an interest in a partnership, as of any other property, it is not required that there be any particular motive for the transfer. There need be no purpose that the transfer benefit the business. It is a basic premise that a bona fide gift is not normally motivated by any business purpose; therefore, the fact that any partner's capital interest in a partnership was acquired from a relative in a purely donative and non-business transaction is not to be considered as an adverse factor in determining whether he actually owns an interest in the enterprise. If he does own such an interest in the business, it is immaterial from whom he acquired it or what motivated the transferor in transferring it to him.

Since legislation is now necessary to make clear the fundamental principle that, where there is a real transfer of ownership, a gift of a family partnership interest is to be respected for tax purposes without regard to the

motives which actuated the transfer, it is considered appropriate at the same time to provide specific safeguards—whether or not such safeguards may be inherent in the general rule—against the use of the partnership device to accomplish the deflection of income from the real owner. Your committee's bill therefore includes specific provisions to prevent the deflection of personal service income and to prevent the allocation of other income in disproportion to capital interests. Your committee's bill requires that the terms of the partnership agreement are to be disregarded where the allocation under the agreement does not substantially reflect the proportionate value of the services or capital of the family members. In this connection the new section 191 added to the code by your committee's bill while specifically providing that nonparticipation in the management or conduct of the partnership business shall not disqualify a person as a partner, provides that this nonparticipation shall be taken into account in determining the proportionate value of the services and capital of each partner. Where reallocation is necessary, a reasonable proportionate allowance for their services is to be made in determining the income of those partners who rendered services. Reallocation of income other than incomes from personal services may not be predicated upon the fact that the capital of one family member was acquired by gift from another.

The amendments made by this section are applicable for taxable years beginning after December 31, 1938."

No. 12520
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

FLO PARKER and ELGIN R. PARKER,

Appellants,

vs.

HARRY C. WESTOVER, Individually and as Collector of
Internal Revenue for the Sixth District of California,

Appellee.

Upon Appeal From the District Court of the United States
for the Southern District of California,

BRIEF FOR THE APPELLEE.

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Appellee.

BRIEF FOR THE APPELLEE.

Opinion Below.

There was no opinion written in this case.

Jurisdiction.

This appeal involves federal income taxes. The taxes in dispute were paid by Elgin R. Parker and Flo Parker for the taxable year 1944 [R. 3, 17] to the Collector of Internal Revenue as follows: Elgin R. Parker paid \$31,370.51 on July 14, 1947, and \$32,138.50 on September 26, 1947 [R. 26], and Flo Parker paid \$31,339.21 on July 14, 1947, and \$32,138.50 on September 26, 1947. [R. 11.] Claims for refund were filed by both taxpayers on January 23, 1948 [R. 4, 18], and no action was taken thereon by the Commissioner within six months. The

complaints were filed in the District Court on September 1, 1948. [R. 10, 24.] The suits were, therefore, timely under Section 3772 of the Internal Revenue Code. Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1340. Judgments in these consolidated cases were entered on January 12, 1950. [R. 35-38.] Within sixty days after the entry of judgments or on February 9, 1950, notice of appeal was filed by taxpayers. [R. 40.] Jurisdiction is conferred on this court by 28 U. S. C., Section 1291.

Questions Presented.

The question presented to the jury in this case was whether the taxpayers had entered into a partnership with their four minor children which is to be recognized for federal income tax purposes. The questions raised by taxpayers on this appeal are:

1. Did the District Court err in failing to give taxpayers' requested instructions Nos. 24, A, C and L?
2. Did the District Court err in giving the Collector's requested instruction No. XXXI?
3. Did the District Court err in admitting in evidence a Memorandum in re Incidence of Federal Tax Liability contained in the guardianship files of the Superior Court of the State of California, County of Orange?
4. Did the District Court err in admitting in evidence an instrument designated as an Application for Authority to Compromise Claims contained in the guardianship files in the Superior Court of the State of California, County of Orange?
5. Is the verdict of the jury supported by substantial evidence?

Statutes Involved.

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) [As amended by Sec. 1, Public Salary Tax Act of 1939, c. 59, 53 Stat. 574.] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * *

(26 U. S. C. 1946 ed., Sec. 22.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. (26 U. S. C. 1946 ed., Sec. 181.)

SEC. 182 [as amended by Sec. 150(g), Revenue Act of 1942, c. 619, 56 Stat. 798]. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

(a) As part of his gains and losses from sales or exchanges of capital assets held for not more than

6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for not more than 6 months.

(b) As part of his gains and losses from sales or exchanges of capital assets held for more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than 6 months.

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b). (26 U. S. C. 1946 ed., Sec. 182.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * *

(2) *Partnership and partner.*—The term “partnership” includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term “partner” includes a member in such a syndicate, group, pool, joint venture, or organization.

* * *

(26 U. S. C. 1946 ed., Sec. 3797.)

Statement.

Taxpayers are husband and wife. They were domiciled in California. Prior to October 31, 1943, they each owned a half interest in the assets of a partnership known as Southern Heater Company. Elgin R. Parker managed the business and received a salary of \$12,000 per year. Flo Parker contributed no service to the partnership. At the time the taxpayers had four children of three, six, seven and fourteen years. [R. 47, 59, 142.]

On October 31, 1943, each taxpayer purportedly gave to each child a sixth and one-quarter per cent interest in the business. [R. 47.] Elgin R. Parker was appointed by the Superior Court guardian of the estates of his four children. [R. 47, 51.] Taxpayers and their children (by their father as guardian and with the approval of the Superior Court) signed a partnership agreement on February 25, 1944 [R. 89-91], purportedly effective as of November 1, 1943. [R. 82.] The instrument provided that the parties agreed to become partners for the conduct of the manufacturing business known as the Southern Heater Company [R. 82] and that the parties contributed capital as follows [R. 83]:

Elgin R. Parker	25%
Flo Parker	25%
Flo Dian Parker	12½%
Patricia Lee Parker	12½%
Rowland Tibets Parker	12½%
Arthur Elgin Parker	12½%

The capital of the new purported partnership was identical with the capital of the business prior to October 31, 1943. Elgin R. Parker continued, as before the purported partnership, to operate and manage the business. No services were rendered to the business by Flo Parker or any of the children. [R. 54, 59.] The children had no property other than their purported interest in the business. [R. 54.]

The net income of the business from 1940 through 1946 was as follows [R. 52]:

For the year 1940 the approximate net income was	\$ 22,500.00
For the year 1941 the approximate net income was	60,000.00
For the year 1942 the approximate net income was	93,000.00
From January 1, 1943, to October 31, 1943, the net income was	140,160.00
For fiscal year ending November 1, 1944, the net income was	260,576.89
For fiscal year ending November 1, 1945, the net income was	231,137.16
For fiscal year ending November 1, 1946, the net income was	306,050.28

The only withdrawals of income during the taxable year here involved by or on behalf of the children were for the payment of income taxes. [R. 53.] The federal income taxes on their behalf was refundable upon the determination of the Commissioner of Internal Revenue that the entire income from the business was taxable to the parents and the amounts so refundable to the children

were used by Elgin R. Parker and Flo Parker in partial satisfaction of their own individual federal income taxes. [R. 56.]

The only withdrawals by the children in 1945 were \$3,750 each which was invested in Government bonds. [R. 53.]

Elgin R. Parker talked to his tax counsel and obtained advice as to the federal income tax consequences of creating a family partnership prior to the formation of the alleged partnership with his children. [R. 53-54, 57, 58, 62, 63.] Elgin R. Parker realized, even before talking to his tax counsel, that if he and his wife gave an interest in the business to their children and formed a family partnership they "should save family income taxes." [R. 58.]

When taxpayers were informed that the purported family partnership arrangement would not be recognized by the Government for income tax purposes, Elgin R. Parker petitioned the Superior Court for use of guardianship funds to pay the deficiency assessed against the parents and for a reallocation of partnership earnings in favor of the parents. [R. 54, 101, 110, 117.] Counsel for the guardian represented to the Superior Court on behalf of the guardian that "the parents furnished all of the capital, do all the work and support the children, so should be taken care of first." [R. 56, 119.] As a further reason for a reallocation of partnership distributable income so the parents would receive a larger percentage than called for in the purported partnership agreement, counsel for the guardian (Mr. Wilson who also represents taxpayers in the present litigation) advised the Superior Court in a memorandum [R. 117-120], filed on behalf of the guardian, that [R. 56, 119] "The father received a

salary of but \$12,000, whereas his services were worth at least \$52,000 per year * * *."

Taxpayers did not move for directed verdict or in any other manner put before the court below the issue, raised here, that there was no evidence sufficient to support a verdict for the Collector. Taxpayers requested the jury [R. 15] and in effect asked that the case go to the jury. The court instructed the jury on the issue and the law applicable. [R. 140-163.] The jury brought in a verdict for the Collector. [R. 34.] Judgments were entered accordingly. [R. 35-36, 37-38.]

Summary of Argument.

The lower court gave proper and adequate instructions to the jury. In brief the instructions were that the jury must consider all of the evidence in determining whether the parties really and truly intended to create a bona fide and genuine partnership for the conduct of the business. If so taxpayers should prevail. On the other hand if the arrangement was without substance but was a mere sham with no genuine business purpose, the verdict should be for the Collector.

The lower court properly admitted in evidence certain documents, over taxpayers' objection, on the basis that they constituted an admission against interest and/or tended to show that the partnership arrangement was of no substance since the parties' intention was that the arrangement could be changed in the event it was not recognized for federal tax purposes.

While the verdict is amply supported by the evidence (the children contributed nothing but gift capital), taxpayers are not in a legal position to raise the question since they filed no motion below for directed verdict.

ARGUMENT.

I.

The Lower Court Properly Instructed the Jury.

What appears to be the principal question raised by taxpayers in this appeal is whether the lower court properly instructed the jury on the law. (Br. 15.) The lower court in its instructions first advised the jury concerning the nature of the consolidated actions brought by the taxpayers for the recovery of federal income taxes and gave a summary of the undisputed facts as well as the contentions of the parties. [R. 140-142.] The jury was told that Elgin R. Parker and his wife, Flo Parker, were, prior to October 31, 1943, partners in the partnership known as Southern Heater Company and that they owned all of the assets of the business. [R. 142.] On that date taxpayers gave to each of their four children, ages three to fourteen years, a one-eighth interest in the assets of the Southern Heater Company and they and their four children, through their father as guardian of their estate, entered into a written partnership agreement on November 1, 1943, for the conduct of the Southern Heater Company. [R. 143.]

The District Court instructed the jury that Elgin R. Parker and his wife, Flo Parker, had a legal right to reduce or avoid altogether their federal income taxes by any legal means available [R. 145] and that the question was whether they [R. 146]

really and truly intended that their four minor children would own an interest in the partnership assets and whether they intended that all six of them would join together for the purpose of carrying on the business and sharing in the profits and the losses as partners.

The jury was informed [R. 146] that—

A partnership is generally said to be created when persons join together their money, goods, labor, or skill, for the purpose of carrying on a trade, profession, or business, and where there is community of interest in the profits and losses.

The District Court made it clear that while nothing in the California or federal law prohibits a family partnership “And there is no reason why Mr. or Mrs. Parker or anyone else should not reduce their taxes by a lawful partnership,” the Government may, for federal income tax purposes, inquire as to whether or not the partnership is bona fide or real. [R. 147-148.] The court had, earlier in its instructions, told the jury [R. 144] that—

The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid. The one who earns income but gives the right to receive that income to a favorite child has enjoyed the benefit of that income within the meaning of the Internal Revenue laws.

The court then restated the question and gave the law as follows [R. 148, 149-150]:

And so, members of the jury, we come to the issue that I stated at the beginning: Was this really and truly a business partnership for the year 1944, and during that year did each of these four children through their guardian actually own their share of the partnership earnings?

* * * * *

The transactions between the plaintiffs and their minor children should be carefully scrutinized by you and that if you determine from all the facts that the plaintiffs were able to retain the substance of all the

rights which previously they had in the Southern Heater Company then you must determine that there was no valid partnership between the plaintiffs and their minor children for federal income tax purposes during the year 1944.

And you must determine after considering all of the facts, including the agreement between these plaintiffs and their minor children, the conduct of the parties to that agreement in the execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of the income and the purposes for which it was used, and any other facts throwing light on the true intent of the parties to the agreement whether those parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise known as Southern Heater Company.

After giving general instructions regarding the credibility of witnesses [R. 150-152], direct and indirect evidence [R. 150-151], inferences which the jury was entitled to draw from the evidence [R. 151], burden of proof and other such matters [R. 144], the District Court, in its final sentence before the jury retired, stated [R. 156]: "Now, ladies and gentlemen, it is your problem to determine the intent of the parties in this case as I have instructed you."

Immediately after retiring the jury was, at the request of counsel for taxpayers, called back and was instructed by the court that Elgin R. Parker received a salary of \$12,000 before the income for the taxable year of \$264,553.92 was divided 25% to Elgin Parker, 25% to Flo Parker and 12½% to each of the four minor children;

further, that Elgin Parker reported and paid a federal income tax on that salary. The court, in the presence of the jury, asked counsel for taxpayers if his instructions as to those matters covered counsel's point and counsel answered in the affirmative. [R. 158-158A.]

After deliberation the jury sent word to the court that it would like further instructions. [R. 158A-158B.] The jury returned to the court room and the foreman asked the court questions as follows [R. 158B-159]:

The first question that we would like to know is, according to the federal law what constitutes a partnership and was the gift taken from the business and re-invested in the business considered a contribution to the welfare of the business?

The second question is, we would like to have you read, sir, in the instructions to the jury with regard to family partnerships. Will you please read the instructions to the jury with regard to family partnerships—that part of the instructions that you gave us this morning?

The court answered the jurors' questions, above quoted, as follows [R. 159-161]:

One instruction that I read this morning was:

"A gift of an interest in a family business, whether absolute or in trust, which makes no real change in the economic situation of the group or in the control or management of the business will not reduce the obligations of the donor to account for and pay income tax on the earnings of the enterprise to the same extent as before the gift was made."

Another one I gave is:

"The issue in this case is whether the partners, Elgin R. Parker and Flo Parker, really and truly in-

tended that their four children would own an interest in the partnership assets and whether they intended that all six of them would join together for the purpose of carrying on the business and sharing in the profits and losses, as partners.”

The Supreme Court has defined a partnership as generally said to be created when persons join together their money, goods, labor, or skill, for the purpose of carrying on a trade, profession, or business, and where there is community of interest in the profits and losses.

And I gave you another instruction as follows:

“While partnerships between husbands and wives, or between parents and children, are always open to scrutiny, and to close scrutiny, such partnerships are lawful. There can be legal partnerships between husbands and wives and parents and children under California law.”

And another one I gave was:

“The fact that transfers to members of the family group may be mere camouflage does not, however, mean that they invariably are.”

And:

“There is no federal law that prohibits a family partnership or a partnership between parents and minor children.”

This case was tried before a jury and I tried my best to have the issues settled by the jury without giving any of my own viewpoints. I want to read to you again the instruction that I said represented the real issue, and that is:

“You must determine after considering all of the facts, including the agreement between these plaintiffs and their minor children, the conduct of the parties

to that agreement in the execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of the income and the purposes for which it was used, and any other facts throwing light on the true intent of the parties to the agreement, whether those parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise known as Southern Heater Company.”

In other words, ladies and gentlemen, it is your problem to determine the intent of these people when they set up this partnership. Did they intend to make a sham out of it for the purpose of avoiding income taxes or was it a real, genuine business partnership for the purpose of joining together in the present conduct of the enterprise known as Southern Heater Company?

After giving the above instructions the court again stated the question to the jury as follows [R. 161]: “You have to take all the evidence together and look upon the whole picture and then determine was this a sham or was it a real partnership?”

Counsel for taxpayers excepted to the failure of the court to give taxpayers’ requested instruction No. 24. [R. 31.] The court noted the exception and stated [R. 157]:

I want to call your attention to the fact that everything requested in your instruction 24 was covered by the court’s instruction. This instruction is argumentative in form and it emphasizes certain facts in this case which the court has purposely avoided doing.

Counsel for taxpayers also excepted [R. 157] to the court’s refusal to give their supplemental requests identified as Numbers A, C and L.

Most of the matters contained in taxpayers' request No. 24 [R. 31] were covered in substance in the instructions given the jury. The court in reviewing the case and giving the undisputed facts advised the jury that the assets of the business given by taxpayers to their children were contributed by the children to the partnership and the court instructed the jury, as above pointed out, that the contribution of capital was a fact to be considered along with all the other evidence in the case in arriving at a decision as to the intention of the parties. [R. 149-150.]

Obviously what taxpayers were seeking by request Numbers 24, A, and perhaps more particularly C [R. 31-32], was to give the jury the impression that taxpayers must prevail if the jury believed that the gifts by taxpayers to their children were unconditional. While the investment of capital, even though it be gift capital, is, as the court pointed out in its instructions, an element to be considered by the jury along with all the other evidence in the case, it is not as a matter of law conclusive and the court properly declined to give the instructions in the language requested by taxpayers. If it were otherwise, the Supreme Court could have easily disposed of the *Lusthaus v. Commissioner*, 327 U. S. 293; *Commissioner v. Tower*, 327 U. S. 280, and *Commisisoner v. Culbertson*, 337 U. S. 733, cases by merely stating that taxpayers should prevail where there was an unconditional gift and the gift capital contributed to the family partnership. It is submitted that there is no room for argument on the proposition that the contribution of gift capital alone is insufficient to require as a matter of law a verdict for the taxpayer in a case of this kind.

Clearly the lower court was correct in declining to give all of the words contained in taxpayers' requested instruction Number L [R. 32-33], since to do so would have given the jury the impresison, obviously hoped for by taxpayers, that the Superior Court's control over the property of the minors gave substance to the partnership and made the children "true" [R. 32] partners for federal income tax purposes. Taxpayers argue that gift capital contributed by a minor where his father is guardian should be decisive whereas a contribution of gift capital by a child of majority might be nothing more than a circumstance to be considered. A mere statement of that proposition is enough to show that the lower court was right in declining to read the instruction to the jury. It should be noted also in that connection that guardianship funds were, with the approval of the Superior Court, used by both taxpayers to satisfy their individual tax obligations and that further demands in that direction were being made in taxpayers' petitions currently pending in the Superior Court. [R. 54.] With that evidence before it, presented by taxpayers as well as the Collector, the jury might have felt some doubt as to whether the gifts were entirely unconditional. That is another reason why the court was not disposed to give the jury an instruction to the effect that the gifts were unconditional and that the children should be recognized as partners for income tax purposes on that account.

It is submitted that the instructions as a whole gave the correct law of the case and that the lower court bent every

effort to give a fair and impartial statement as to the evidence and the issues. The very language of pertinent portions of the instructions was taken from the opinion in the *Culbertson* case, *supra*. Particular reference in that regard is made to a portion of the instruction, above quoted, to the effect that all of the facts should be considered, including the agreement, the conduct of the parties in the performance of the agreement, their statements, testimony of other persons, the relationship of the parties, their abilities and capital contributions, as well as the actual control of the income. That instruction, the language of which was taken from the *Culbertson* decision, appears twice in the instruction. [R. 149, 160.] The court stated and restated with emphasis, that the question was whether the parties intended to enter into a real genuine business partnership or whether the partnership was a mere sham. [R. 146, 148, 149-150, 156, 160, 161.] It is noteworthy that taxpayers have made no contention that the court's manner of giving the instructions was in anywise prejudicial to their case. No such contention could have been made. The court gave no special emphasis in delivery to any particular portion of the instructions. Nothing said by the court to the jury or in its presence gave any indication whatsoever as to how the court would have decided the factual issue. The court repeatedly told the jury not to gain the impression from anything the court said or did that the court thought that the verdict should go one way or the other and that the jury was the sole judge of the facts.

II.

The Lower Court Properly Gave the Collector's Request for Instruction No. XXXI to the Jury.

The Collector's requested instruction No. XXXI [R. 33] is as follows:

You are instructed that common understanding and experience are the touchstones for the interpretation of the revenue laws. The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid. The one who earns income but gives the right to receive that income to a favorite child has enjoyed the benefit of that income within the meaning of the Internal Revenue Laws.

There appears to be no necessity of extending this brief by a discussion of the authorities which also clearly support the instruction. (*Helvering v. Horst*, 311 U. S. 112; *Lucas v. Earle*, 281 U. S. 111; *Lusthaus v. Commissioner*, *supra*; *Commissioner v. Tower*, *supra*; *Commissioner v. Culbertson*, *supra*.) Reference is also made to Section 22(a) of the Internal Revenue Code, *supra*, defining gross income.

III.

The Lower Court Properly Admitted in Evidence an Instrument Contained in the State Court Guardianship Files Designated as a Memorandum in re Incidence of Federal Income Tax Liability on 1944 Partnership Income.

Taxpayer, Elgin R. Parker, testified that he received a salary from the partnership business of \$12,000 for the fiscal year ending October 31, 1944, which is the taxable year in suit and that such salary represented reasonable compensation for his services rendered to the business during that period. [R. 49, 51.] Mr. Parker further testified that he and his wife filed claims against the guardianship estate in the amount of \$111,151.89. [R. 54.] Taxpayers introduced in evidence an Application for Authority to Compromise Claims [R. 101, Pltf. Ex. 16] and introduced as a part of the same exhibit an Order for Authority to Compromise Claims [R. 105], signed by the Judge of the Superior Court [R. 107] April 25, 1947, in which Elgin R. Parker and Flo Parker were authorized to use refunds of federal income taxes, payable to the minors, in partial satisfaction of a deficiency of federal income taxes assessed against Elgin R. Parker and Flo Parker. [R. 106-107.] Upon said application the court further ordered [R. 106]—

That in the event Elgin R. Parker and Flo Parker eventually lose their litigation with the Commissioner of Internal Revenue with respect to the incidence of the tax on the income of this partnership that Elgin

R. Parker and Flo Parker be permitted to keep and retain said refunds in at least part settlement of their claims against the guardianship estate on account of income taxes, and that the claims of Elgin R. Parker and Flo Parker be further considered, and if necessary, adjudicated.

In support of their petitions or applications for authority to use guardianship funds for the benefit of taxpayers herein, the guardian's attorney, Melvin D. Wilson, filed a memorandum on behalf of the guardian [R. 117-120], in which it was urged that the estates of the children should bear all of the additional income tax burden of their parents resulting from a non-recognition for federal income tax purposes of the family partnership. The memorandum contains certain reasons upon which the guardian petitioned that the children should bear the deficiencies in federal income taxes assessed against their parents. Included therein is the following [R. 119]:

The father received a salary of but \$12,000, whereas his services were worth at least \$52,000 per year. If a full and fair salary of \$52,000 per year had been paid the father, a result more comparable to that shown in situation C would have obtained.

Taxpayers, in their brief (p. 35), say that the lower court erred in admitting the memorandum in evidence for the reason that—

This memorandum was filed with the Superior Court by appellants' counsel without appellants'

knowledge and without any information or advice from them. It contained a statement by the counsel that Elgin R. Parker's services were worth \$52,000.00 per year. This was an expression of opinion by a person not shown to be qualified as having a worthwhile opinion on this point and furthermore it was a statement of opinion and not a statement of fact. It was made without the appellants' knowledge and without any information or advice having been given by them to their counsel on such point.

Mr. Parker testified, as stated in taxpayers' brief (p. 34), that his attorney, Mr. Wilson, was authorized to file papers on his behalf in the guardianship matter; further, that after Mr. Wilson had filed the memorandum in question, counsel sent him a copy of the memorandum [R. 58] and that he, Mr. Parker, did not go to the Superior Court and disaffirm the statement in the memorandum that his services were worth to the partnership \$52,000 a year rather than \$12,000 a year, being the amount paid. It is submitted that under the circumstances and the evidence in this case the memorandum was admissible as an admission against interest.

Conclusion.

The District Court gave proper and adequate instructions to the jury and the court ruled correctly on the admissibility of evidence. Taxpayers cannot raise the question as to whether the verdict finds support in evidence. Moreover, the verdict is amply supported by the evidence. The judgments of the District Court should be affirmed.

Respectfully submitted,

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No. 12521

United States
Court of Appeals
for the Ninth Circuit.

PORTLAND-COLUMBIA LUMBER COMPANY,
a Corporation,

Appellant,

vs.

J. W. FEAK, Doing Business as J. W. Feak Mer-
cantile Company,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Southern Division.

FILED

AUG 19 1950

PAUL P. O'BRIEN

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Western District of Washington, Southern
Division

Civil Action No. 1165

PORTLAND-COLUMBIA LUMBER COMPANY,
a Corporation,

Plaintiff,

vs.

J. W. FEAKE, d/b/a J. W. FEAKE MERCANTILE
COMPANY,

Defendants.

PRE-TRIAL ORDER

As the result of pre-trial conferences heretofore had, whereat the plaintiff was represented by Fred C. Dorsey and Justin N. Reinhardt, and the defendant by L. L. Thompson, their attorneys of record, whereupon the following issues of fact and law were framed and exhibits identified.

Admitted Facts

The following are the admitted facts:

I.

Plaintiff is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Oregon and has complied with all laws and paid all fees and licenses due to any public authority and is entitled to do business as a corpora-

tion. It is engaged in the lumber business and it buys and sells lumber and wood products and also acts as a broker and wholesaler of lumber and lumber products, and, through its affiliate, Prudential Lumber Company, engaged in the sale of lumber at retail.

II.

Between the first of November, 1946, and the first of February, 1947, the defendant shipped by direction of the plaintiff, twenty-six carloads of lumber to Prudential Lumber Company, plaintiff's affiliate in the City of New York. For each of said carloads defendant presented to the plaintiff a typewritten invoice, identified herein as Plaintiff's Exhibits A to Z, inclusive. This paragraph, however, refers only to the typewritten matter of said invoices. The longhand notations thereon were not placed there by the defendant or by his direction and nothing in this paragraph shall be considered to bind the defendant concerning the materiality or correctness of said notations. Neither shall this paragraph be considered as acknowledgment by the defendant that said invoices correctly set forth the agreement referred to in this action.

III.

Plaintiff paid defendant the amount specified in each of said invoices, subject to minor adjustments to correct errors in calculation, and the sums so paid by the plaintiff to the defendant represented the price demanded by the defendant of the plaintiff in

payment for each of said cars of lumber, and were paid by plaintiff to defendant in payment for each of said cars of lumber.

IV.

No bill, invoice, statement or demand for payment of any of the cars of lumber shipped as aforesaid by the defendant to the plaintiff was ever presented by or on behalf of the defendant to the plaintiff except the invoices identified as A to Z, inclusive.

V.

In the month of February, 1947, the plaintiff made a claim against the defendant for alleged overcharges claimed by it to have been made by defendant in connection with the delivery of said twenty-six carloads of lumber hereinbefore referred to. Defendant denied that he had made any such overcharge. After negotiations, defendant undertook to deliver certain lumber to plaintiff at forty-four dollars per thousand board feet loaded on cars. The contentions of the parties regarding the terms and effect of this undertaking are set forth in their respective contentions herein.

VI.

M. M. Rothstein is the President and a stockholder of Portland-Columbia Lumber Company and is the Vice-President and a stockholder of Prudential Lumber Company and acted for both companies in all their dealings with the defendant.

VII.

At no time did the plaintiff ever give to the defendant any notice previous to the inspection thereof of the time or place when it would cause said twenty-six carloads of lumber or any portion thereof to be inspected after arrival at the place or places to which such carloads were shipped.

Plaintiff's Contentions

I.

The defendant, acting through James Arthur Powers, his representative, in October, 1946, agreed to sell and deliver to the plaintiff finished Douglas Fir lumber at a price equal to the OPA scheduled ceiling price for rough lumber of the grades and quantities shipped by defendant to plaintiff, plus five per cent of that sum, plus the sum actually paid by the defendant for remanufacture of said lumber, plus five dollars per thousand board feet.

II.

The first few invoices submitted by defendant to plaintiff were not in accordance with this agreement. Therefore, plaintiff insisted that the lumber be price-tallied after remanufacture and that the invoices be based upon such a price-tally. Defendant agreed to this, but stated the price-tally could not be made by an official inspector since there was none available.

III.

The lumber delivered to the plaintiff by the defendant did not conform to the grades, quantities and species listed in the invoices identified herein as A to Z, inclusive, but instead contained lumber which, at the prices agreed upon by the parties, as aforesaid, should have been billed at \$4277.79 less than defendant demanded and plaintiff paid. In addition because of substitutions of hemlock, plaintiff suffered a loss of \$558.60.

IV.

The specific complaints presented by plaintiff against defendant and referred to in paragraph V of agreed facts herein were that the lumber contained in each of the twenty-six cars delivered by the defendant to the plaintiff did not correspond in quantity, grade or species with the invoice, and plaintiff told defendant that each of said twenty-six cars was intact and plaintiff proposed to defendant that if defendant had any doubts about these complaints, they should agree to have the lumber inspected by an official inspector. Defendant proposed that instead of going to the expense of an official inspection, he would undertake to deliver to the plaintiff twenty cars of lumber at prices sufficiently below the current market to compensate plaintiff in part for the alleged overcharges. The price fixed was forty-four dollars per thousand board feet loaded on cars. Plaintiff specified that the lumber should be either one inch or two inches

thick and that the cars should be loaded uniformly to that all lumber in each car would be of the same thickness and that all twenty cars should be delivered in not less than thirty days from March 4, 1947. Defendant, through his representative, James Arthur Powers, stated that he might not be able to deliver all twenty cars within thirty days and that deliveries would be faster if plaintiff would take some three-inch and four-inch lumber. On that representation, plaintiff agreed that some three-inch and four-inch lumber might be sent along with the one-inch and two-inch lumber. Plaintiff retained control over the quantity of three-inch and four-inch lumber by providing that the one-inch and two-inch lumber was to be shipped to the Carlson Mill in Vancouver, Washington, and that shipping instructions for three-inch and four-inch cars would be furnished by Mr. Rothstein. The negotiations of the parties are reflected generally in Exhibits A, B, C and D, attached to the Amended Complaint. Defendant did not deliver or tender to plaintiff any one-inch or two-inch lumber after March 4, 1947, but did deliver two cars of four-inch lumber and did ask shipping instructions for additional cars of four-inch lumber, which the plaintiff refused to furnish on the ground that it was not in accordance with the defendant's undertaking.

V.

Plaintiff was not obliged to accept any lumber under the arrangement described in paragraph V of agreed facts herein.

VI.

The defendant is not entitled to affirmative relief against the plaintiff on his cross-complaint.

Defendant's Contentions

Defendant's contentions are as follows:

I.

The plaintiff, acting through James Arthur Powers, its representative in the month of October, 1946, approached the defendant and sought to purchase from the defendant certain rough, green fir lumber. After certain negotiations, the parties entered into an agreement under which the defendant agreed to procure for the plaintiff as its representative such rough, green lumber as the plaintiff would require for a considerable period of time, estimated to amount to approximately five carloads per week. The agreement, in substance, was as follows:

It was agreed that the defendant was to procure rough, green unfinished lumber of various sizes from a number of sawmills in the area in which the defendant resided, principally in Pierce and Lewis Counties in the State of Washington. This lumber was to be purchased by defendant from various small mills cutting this type of lumber on the basis of the grade furnished by the supply mills and on the basis of inspections made by such mills. It was further agreed that the defendant would pay for such green lumber the price fixed for such sales by

the then existing O. P. A. regulations, and in submitting his final statement would bill the plaintiff in the same amounts which he paid to the supply mills, but that he would receive a finders fee of five per cent of the selling price of said lumber by such supply mills as compensation for his expenses, time and services in locating said lumber and arranging for its purchase. It was further agreed that defendant would arrange for the remanufacture of such lumber into finished lumber at such remanufacturing plants as were available, would advance the cost of such remanufacture, and would also supervise the shipment of the finished product after remanufacture, as directed by the plaintiff. For this additional service and for financing the transaction, it was agreed that defendant was to receive a further fee of five dollars per thousand feet so furnished.

Defendant complied with his agreement in all respects and caused to be shipped to plaintiff approximately thirty carloads of lumber, which included the twenty-six carloads particularly described in plaintiff's Exhibits A to Z, inclusive. The first five invoices submitted by defendant to plaintiff set forth the transaction in accordance with the true agreement and intent of the parties, i.e. such invoices showed the mill grades of such rough, green lumber furnished by the supply mills from which they were procured by defendant and the sums of money which had been paid by the defendant to the supply mills, and in addition thereto the finders fee and additional five dollars per thousand commission

hereinbefore referred to. Thereafter, the plaintiff requested the defendant to change the form of invoices by showing to the best of its ability the grades and amounts of lumber after remanufacture, stating to the defendant that this would facilitate the sale of such lumber on the retail market in the east. Defendant changed the form of invoices which he had heretofore used, to facilitate plaintiff's business. In other words, he attempted to give a breakdown tally of what the lumber purchased was remanufactured into provided no change of grade and no footage loss in remanufacture. This was a theoretical calculation, however, made to facilitate the business of the plaintiff and was not intended or understood to in any way change the original agreement of the parties.

II.

The plaintiff made no complaint to the defendant concerning the quality, grade or species of the lumber delivered until all of said twenty-six carloads had been paid for and had been received some place in the City of New York. The last of said carloads arrived in New York in the latter part of January, 1947, the exact date being unknown to defendant. About this time, one M. M. Rothstein, the president of the plaintiff, cancelled all further deliveries of lumber by defendant. At this time defendant had purchased and caused to be remilled and loaded on cars for the use of plaintiff an additional five carloads of lumber. A conference was thereupon had between defendant and Rothstein, at which time plaintiff asserted a claim against the defendant for

three thousand dollars for alleged damages sustained by him in connection with the delivery of the twenty-six carloads previously referred to. At the same time, defendant asserted that he had been damaged by reason of the refusal of plaintiff to accept the additional five carloads.

III.

After some negotiations, a compromise agreement was entered into, which is generally set forth in Exhibits A, B, C and D attached to the amended complaint. In effect, the agreement was that the defendant would sell to the plaintiff twenty carloads of rough, green fir or pine lumber of random length and width, of uniform thickness of either one, two, three or four inches so long as each car consisted entirely of one thickness only. The agreed price was to be forty-four dollars per thousand f. o. b. on cars, and it was further agreed that the number one and number two lumber should be shipped to Carlson Planing Mill at Vancouver, Washington, and the number three and number four to be shipped as directed by the plaintiff. It was further agreed that defendant would proceed as rapidly as reasonably possible to make said shipments but no definite time was agreed upon. In order to fulfill this order, the defendant made cutting arrangements with certain mills in the vicinity of Rochester, Washington, and in some instances financed mill charges. He shipped two carloads of number four lumber and had two or more carloads of number one and number two lumber ready for

shipment besides a carload of number four. He communicated with the plaintiff to secure shipping instructions concerning the shipment of this carload and was then advised by a representative of the plaintiff that plaintiff would not accept delivery of said car or any other carloads of lumber.

IV.

In an effort to minimize his loss, defendant resold the lumber which he had previously purchased to complete said order at a price substantially less than the one provided in the compromise agreement. In order to make this resale he had to cause this lumber to be rehandled and hauled to a remilling plant to suit the convenience of the buyer, and in connection therewith was compelled to expend the sum of \$1,701 for such rehandling and transportation. In addition to this item defendant was also compelled to sell such lumber for a sum which was \$4,171.18 less than he would have received had plaintiff accepted delivery of the remaining 18 carloads covered by the compromise agreement. The agreement hereinbefore referred to was understood and agreed to be in compromise and settlement of any claims which either of the parties might have against the other, including plaintiff's claim for damages by reason of alleged overcharges with respect to the twenty-six cars.

V.

Defendant contends that both of the alleged causes of action set forth in plaintiff's complaint should be dismissed and that he should have and recover judg-

ment against the plaintiff upon his cross-complaint in the sum of \$1,701.00, extra transportation costs, and the sum of \$4,171.18 lost profits, or a total of \$5,872.18.

Issues of Fact

The following are the issues of fact to be determined by the jury:

1. Did the lumber sold by defendant to plaintiff and covered by invoices identified as A to Z inclusive herein conform to the invoice description in respect to quantity, grade and species?

2. Did the invoices identified as A to Z inclusive herein conform to the agreement of the parties regarding price?

3. Did the agreement of the parties regarding price refer to the O. P. A. ceiling for lumber as graded before remilling or after remilling?

4. What was the difference, if any, between the invoice price and the agreed contract price for the lumber sold by the defendant to plaintiff under invoices identified as A to Z inclusive herein?

5. Was there any agreement between the parties that no claim for damages based upon inspections made in New York could be made without previous notice to the defendant of the time and place of such inspections?

6. Did the defendant's conduct in March, 1947, conform to his undertaking, if any, with respect to

the twenty (20) additional cars of lumber. If it did not, did the plaintiff suffer any damage thereby, and if so, how much?

7. Did the plaintiff's conduct in March, 1947, conform to his undertaking, if any, with respect to the twenty (20) additional cars of lumber. If not, did the defendant suffer any damage thereby, and if so, how much?

Issues of Law

1. If there was an agreement such as is mentioned in Issue of Fact No. 5 herein,

a. Was it abrogated by the negotiations of the parties in February and March of 1947?

b. Is defendant estopped from relying on the agreement as a defense against plaintiff's claim?

2. If there was an agreement such as is mentioned in Issue of Fact No. 5 and plaintiff had no inspection other than the original tallying of the lumber when it was received in New York, which was done without prior notice to the defendant, does the agreement prevent plaintiff from recovering on his first cause of action?

3. Did the negotiations of the parties in February and March of 1947 result in an executory accord or a novation?

4. Does plaintiff's refusal to give defendant shipping instructions in March, 1947, after delivery to him of the two cars of 4" lumber by the defend-

ant, prevent plaintiff from recovering on his first cause of action herein:

a. If the plaintiff's refusal to give such instructions was justified,

b. If plaintiff's refusal to give such instructions was not justified.

5. Does plaintiff's failure to give such instructions give rise to a cause of action in favor of defendant against plaintiff.

Interrogatories and Demands of the Parties

The deposition of defendant was taken by the plaintiff pursuant to notice on February 17, 1949. Thereafter, the attorney for plaintiff served on attorney for defendant a demand dated May 7, 1949, for the production of certain documents, a copy of which demand is attached hereto. Under date of September 9, 1949, plaintiff's attorney served upon defendant's attorney certain interrogatories, requests for admissions and demand for the production of documents, a copy of which is attached hereto, together with the defendant's answers.

On September 26, 1949, the defendant took plaintiff's deposition and thereafter under date of September 28, 1949, defendant's attorney served upon plaintiff's attorney certain interrogatories, a copy of which is attached hereto.

It is stipulated and agreed that each of the parties has answered the interrogatories and requests for admissions of the adverse party, and that all the

documents produced by either party in response to said demands for the production of documents are included in the documents identified as exhibits in the following section hereof, and that no document was produced by either party and no document will be produced at the trial by either party which is not included in the exhibits identified in the following section hereof. It is further agreed that neither party will seek to preclude the other by reason of any failure to produce documents or to reply to interrogatories or demands more fully or more formally than was done.

Exhibits

The following exhibits were produced and marked and may be received in evidence if otherwise admissible, without further authentication, except as hereinafter set forth, it being admitted that each is what it purports to be:

Plaintiff's Exhibits

1. Exhibits A to Z inclusive consisting of 26 invoices hereinbefore referred to.
2. The letters marked A, B, C and D, attached to the amended complaint herein.
3. Exhibits 1, 2 and 3, identified in the deposition of James Arthur Powers, taken September 26, 1949.
4. Exhibits marked A to Z, inclusive, identified in the deposition of Theodore Kimmlingen, taken

October 6, 1949. Defendant contends that these exhibits were not properly identified and therefore does not admit their authentication.

5. A summary tabulation showing the information contained in item 1 hereof and item 4 hereof.

6. Crow's Digest showing O. P. A. ceiling prices in effect at the times material to this litigation.

7. Letter from Prudential Lumber Corporation, to Mr. Milton Rothstein, Portland Columbia Lumber Company, dated January 23, 1947.

8. Letter from Prudential Lumber Corporation to Mr. Milton Rothstein, Portland Columbia Lumber Company, dated February 20, 1947.

Defendant's Exhibits

1. Bills from the remilling plants accompanied by sight drafts covering the remilling of the lumber invoiced by the defendant to the plaintiff under Exhibits A to Z of item 1 of Plaintiff's Exhibits supra.

2. Bill of lading covering car No. 701608 Milw. together with notice from the Bank of California to defendant of receipt of sight draft on Portland Columbia Lumber Company for collection.

Draft drawn by J. W. Feak on Portland Columbia Lumber Company in the amount of \$1440.36 with bill of lading attached.

Copy of remilling bill with pencil figures on the bottom.

3. Bill of lading for Car No. 145209 ATSF, sight draft drawn by defendant on plaintiff.

Notice of collection of said draft from the Bank of California to defendant.

Copy of defendant's invoice to plaintiff.

Bill from Hammersmith Lumber Company to defendant for remilling the lumber loaded in this car.

Two sheets of pencil figures alleged to show the tally of lumber as loaded on this car.

Weigh bill showing shipment by Hammersmith Lumber Company to defendant.

Bill of lading showing shipment by Hammersmith Lumber Company to the defendant.

4. Invoice 12147, defendant to plaintiff, covering car No. 192906 UP.

Sight draft drawn by defendant on plaintiff.

Sheets alleged to show tally of lumber loaded on this car.

Bill of Ducoda Planing Mill to defendant for remilling the lumber loaded on this car.

5. Bill of lading for Car No. 471354 Pa. showing defendant as shipper and consignee, with instructions to notify Carlson Planing Mill.

Defendant's invoice to plaintiff.

Sight draft drawn by defendant on plaintiff.

Notice by Bank of California to defendant of receipt of sight draft for collection.

Notice from Bank of California to defendant of collection.

6. Undated document entitled "History" bearing the signature purporting to be that of James Arthur Powers.

7. Carbon copy of document purporting to be a

letter dated February 28, 1947, addressed to J. W. Feak Mercantile Company, Roy, Washington, unsigned, but ending with the following typewritten words: "M. Milton Rothstein, For, Prudential Lumber Corporation."

8. Letter dated May 15, 1947, from Justin N. Reinhardt to the defendant.

9. Copy of letter dated June 3, 1947, from the defendant to Justin N. Reinhardt in reply to item 8.

10. Crow's Price Reporter covering the weeks of March 6, March 20, April 3, May 1, May 15, May 29, June 12 and June 29, 1947.

The foregoing pretrial order has been approved by the parties hereto, as evidenced by the signatures of their counsel hereon, and this order is hereby entered, as a result of which the pleadings pass out of the case, and this pretrial order shall not be amended except by agreement of the parties to prevent manifest injustice.

Dated at Tacoma, Washington, this 17th day of October, 1949.

/s/ JUSTIN N. REINHARDT,

One of the
Attorneys for Plaintiff.

/s/ L. L. THOMPSON,

One of the
Attorneys for Defendant.

/s/ CHARLES H. LEROY,
United States District Judge.

[Title of District Court and Cause.]

WRITTEN INTERROGATORIES PROPOUNDED BY DEFENDANT TO PLAINTIFF UNDER RULE 33.

Comes now the defendant herein, pursuant to the provisions of Rule 33 of the District Court rules of the District Courts of the United States, and submits the following written interrogatories to be answered by the plaintiff within fifteen (15) days after the delivery of these interrogatories to it in the form prescribed by such rule:

Interrogatory No. 1

Set forth the particular place in the City of New York where the carloads of lumber referred to in plaintiff's complaint were unloaded, the names of the persons, firms or corporations who unloaded the lumber from said cars and the exact dates when each car was unloaded.

Interrogatory No. 2

Set forth the time, place and by whom inspections, if any, of said lumber were made in behalf of the plaintiff, said answer to give the specific dates when each carload was so inspected and where inspected. If written inspection reports were made to the plaintiff, then attach to your answer to this interrogatory copies of any and all inspection reports so made.

Interrogatory No. 3

Set forth the sums received by you for the sale of lumber on each and every carload of lumber referred to in the plaintiff's complaint and the name of the person, firm and corporation to whom said lumber was sold and delivered.

Interrogatory No. 4

Set forth the time and place and by whom made of the first alleged complaint made by the plaintiff or by any person in its behalf to the defendant concerning the alleged overcharges claimed to have been made by the defendant and described in the plaintiff's complaint.

Interrogatory No. 5

Set forth a detailed computation of the alleged damage of \$7,560.00 claimed to have been sustained by the plaintiff under the alleged facts set forth in the second paragraph of the second alleged cause of action in the complaint.

Interrogatory No. 6

Set forth the time, place and by whom the plaintiff was advised that it was defendant's intention to deliver only four inch lumber to plaintiff as alleged in paragraph 2 of the second alleged cause of action in plaintiff's complaint.

Dated this 28th day of September, 1949.

L. L. THOMPSON,
HENDERSON, CARNAHAN &
THOMPSON,

Attorneys for Defendant.

[Title of District Court and Cause.]

ANSWER TO REQUEST FOR
ADMISSIONS UNDER RULE 36

Comes now the defendant herein and in response to the request of the plaintiff for certain admissions concerning the genuineness of certain documents, admits, denies and alleges as follows:

I.

With respect to Request No. 1, defendant admits that the typewritten portions of certain documents marked "A" to "Z" inclusive and delivered to defendant with said request are genuine and were mailed by defendant to the plaintiff. Defendant however states that he has no knowledge or information concerning the longhand notations made on said documents and states that they were not made by him or any person under his direction.

II.

With respect to Request No. 2, this defendant admits that each of said documents therein referred to covers one carload of lumber shipped by him to the plaintiff.

III.

With respect to Request No. 3, defendant admits that the carloads of lumber covered by said documents were shipped in certain railroad cars having the names and numbers set forth in said request.

IV.

With respect to Request No. 4, defendant denies that each of said carloads of lumber contained lumber of the grades and amounts set forth in said request.

V.

With respect to Request No. 5, defendant admits the truth thereof.

VI.

With respect to Request No. 7, defendant admits that, except for minor adjustments, the plaintiff paid to him the sum specified in documents Nos. A to Z inclusive.

VII.

With respect to Request No. 8, this defendant states that the method of computation therein set forth in invoices Nos. A to Z, inclusive was made at the request of plaintiff and to facilitate his business but does not admit that said computations correctly set forth the actual contract between the parties.

J. W. FEAK,

Defendant.

L. L. THOMPSON,

HENDERSON, CARNAHAN &
THOMPSON,

Attorneys for Defendant.

Duly verified.

[Title of District Court and Cause.]

ANSWER TO WRITTEN INTERROGATORIES

Comes now the defendant and in answer to the written interrogatories filed herein, states:

I.

Answering Interrogatory No. 11 this defendant has marked Exhibit A and attached hereto a statement of the items included in the cross complaint on file herein.

II.

Answering Interrogatory No. 12, this defendant states that the names of the mills therein referred to were as follows:

Hagerman Mill

Charles James Mill, both of Little Rock, Washington

Harrington Mill Co. of Olympia, Washington

George Cordell of Rochester, Washington

George Niemi Mill of Rochester, Washington

Ralph Brink of Rochester, Washington

J. W. FEAKE,
Defendant.

L. L. THOMPSON,
HENDERSON, CARNAHAN &
THOMPSON,
Attorneys for Defendant.

Duly verified.

EXHIBIT "A"

1947	Footage	Received Payment	Loss Incurred by Diversion
June 9.....	232,078	\$ 7,677.59	
June 20.....	13,849	553.96 Less 2%	
June 20.....	5,935	237.40 Less 2%	
June 30.....	3,136	125.44 Less 2%	
June 30.....	24,361	964.10 Less 2%	
July 9.....	4,256	170.24 Less 2%	
July 9.....	384	14.81 Less 2%	
July 9.....	10,752	416.92 Less 2%	
July 21.....	17,771	710.84 Less 2%	
Aug. 27.....	4,629	21.76 Less 2%	\$11,476.20
Aug. 5.....	13,920	542.88 Less 2%	7,677.59
Aug. 5.....	1,184	40.26 Less 2%	\$ 3,798.61 Less 2%=\$ 75.97
July 31.....	10,341	413.64) Less 2%	
Aug. 5.....	15,104	583.14) Less 2%	
Aug. 5.....	3,210	73.17) Less 2%	1,069.95 Less 2%= 21.40
Totals	360,910	\$12,546.15	

360,910' @ \$44.00 per M. would have brought \$15,880.04

Actually brought 12,546.15 \$3,333.89

Loss in cost of hauling 425,251' @ \$4.00 per M. 1,701.00

Bucoda Lumber:—

64,341 @ \$44.00 per M\$2,831.00

Actually brought \$32.50 per M. 2,091.08 739.92

Loss incurred\$5,872.18

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS UNDER RULE
36 AND INTERROGATORIES UNDER
RULE 33 OF THE FEDERAL RULES OF
CIVIL PROCEDURE

The plaintiff herein, Portland-Columbia Lumber Company, a corporation, requests the defendant, J. W. Feak, within 15 days after service of this request, to make the following admissions numbered 1 to 5 inclusive and 7 and 8, of the numbered paragraphs found below pursuant to Rule 36 of the Federal Rules of Civil Procedure for the purpose of this action only and subject to all pertinent objections as to admissibility which may be interposed at the trial and to answer the following interrogatories numbered 6 and 9 to 13 inclusive of the numbered paragraphs found below pursuant to Rule 33 of the Federal Rules of Civil Procedure.

(1) That each of the following documents exhibited with this request is genuine:

Invoice No.	Dated	Quantity	Invoice Price
A.	Nov. 6, 46	25,382'	\$1,467.92
B.	Nov. 6, 46	26,939'	1,561.53
C.	Nov. 14, 46	31,204'	1,782.69
D.	Nov. 14, 46	30,269'	1,738.53
E.	Nov. 15, 46	25,442'	1,440.36
F.	Dec. 3, 46	40,406'	2,474.26
G.	Dec. 3, 46	30,310'	1,778.97
H.	Dec. 4, 46	28,867'	1,679.11
I.	Jan. 6, 46	24,713'	1,471.32
J.	Jan. 6, 46	24,525'	1,415.68

K.	Jan. 8, 46	24,606'	1,457.95
L.	Jan. 10, 46	33,128'	1,900.79
M.	Jan. 10, 46	27,488'	1,602.62
N.	Jan. 10, 46	23,303'	1,399.01
O.	Jan. 10, 46	24,933'	1,657.03
P.	Jan. 13, 46	23,911'	1,415.55
Q.	Jan. 15, 46	30,407'	1,803.40
R.	Jan. 20, 47	32,408'	1,920.97
S.	Jan. 20, 47	25,780'	1,599.57
T.	Jan. 21, 47	31,467'	1,821.24
U.	Jan. 21, 47	32,593'	2,040.57
V.	Jan. 22, 47	23,084'	1,372.05
W.	Jan. 22, 47	31,337'	1,890.55
X.	Jan. 23, 47	26,739'	1,650.96
Y.	Jan. 23, 47	23,780'	1,470.44
Z.	Jan. 24, 47	20,529'	1,226.33

(2) That each of the twenty-six invoices numbered "A" to "Z" above covers one carload of lumber shipped by the defendant to the plaintiff.

(3) That the carloads of lumber covered by each of said invoices respectively are as follows:

Invoice No.	Car No.	Railroad
A.	146780	New York Central
B.	102133	New York Central
C.	129283	Atchison, Topeka & Santa Fe
D.	38195	SSW
E.	701608	Chicago, Milwaukee & St. Paul
F.	176340	Soo
G.	265228	Pennsylvania
H.	21233	Central Railway of New Jersey
I.	140208	Chicago, Rock Island & Pacific
J.	146401	New York Central
K.	18999	Chicago, Milwaukee & St. Paul
L.	124110	New York Central
M.	15032	L & A
N.	61552	Chicago-Northwestern
O.	6573	International Great Northern
P.	117295	Atchison, Topeka & Santa Fe

Invoice No.	Car No.	Railroad
Q.	31960	Chicago, Burlington & Quincy
R.	32365	Chicago, Burlington & Quincy
S.	145209	Atchison, Topeka & Santa Fe
T.	26534	Northern Pacific
U.	192906	Union Pacific
V.	49828	Chicago-Northwestern
W.	48978	Great Northern
X.	84124	Pennsylvania
Y.	15395	NKP
Z.	174627	B & O

(4) Each of said carloads of lumber represented by designated invoice number, contained lumber of the following grades and amounts:

Inv. No.	Grades and Amounts						
	Select Struc-tural	Select Mer-chantable	No. 1	No. 2	No. 3	No. 4	Hem-lock
A.	167	1367	7495	5158	6264	1115	3584
B.	1403	2779	8646	3622	5349	1264	3538
C.	....	620	9877	6311	6773	1897	4148
D.	....	1182	8820	7105	7045	1574	4700
E.	1569	2051	6988	4937	3975	2126	3675
F.	1649	2413	13515	4746	8889	1405	7522
G.	698	1183	9134	5371	8163	576	5223
H.	376	671	8329	7120	5588	698	4087
I.	....	1010	6803	4732	7025	961	4120
J.	24	1410	7490	5399	7077	875	2048
K.	514	1029	8335	4216	5369	1225	3829
L.	976	1246	11151	5962	8826	2391	3137
M.	55	302	6879	7677	6246	1155	5204
N.	47	1218	6233	5302	6663	1337	3084
O.	85	1118	6790	5941	5942	1070	3754
P.	278	963	8768	3725	6639	887	4083
Q.	61	2109	8653	7001	7674	825	4253
R.	....	677	9221	9634	7970	1759	2512
S.	437	625	6127	5564	4605	917	2566

T.	62	910	9199	9827	6185	1318	3896
U.	....	536	4751	6494	9812	2880	8526
V.	555	856	5974	4909	6020	1528	3215
W.	....	1088	9273	7564	6181	1944	2758
X.	534	588	10722	7406	5267	481	1741
Y.	....	520	5538	5261	7247	2393	4461
Z.	183	1446	5827	4319	5684	484	2303

(5) No bill, invoice, statement or demand for payment of any of the cars of lumber shipped from "A" to "Z" as aforesaid by the defendant to the plaintiff was ever presented by or on behalf of the defendant to the plaintiff except the invoices identified as "A" to "Z" inclusive.

(6) If your answer to the preceding question is "no," you are required to produce and identify each invoice, bill, statement or demand, other than the invoices designated "A" to "Z" inclusive above mentioned, sent by you or on your behalf to the plaintiff in connection with any or all of the 26 cars of lumber shipped by you and specifically identified in item No. 3 above.

(7) That except for minor adjustments, the plaintiff paid to the defendant each of the sums specified in invoices identified as "A" to "Z," supra, and that the sums so paid by the plaintiff to the defendant represented the price demanded by the defendant of the plaintiff in payment for each of said cars of lumber and were paid by plaintiff to defendant in payment for each of said cars of lumber.

(8) That the amount demanded of the plaintiff

by the defendant in payment for each of said carloads of lumber shipped by the defendant to the plaintiff and paid by the plaintiff to the defendant was computed in the manner specified in said invoices identified as "A" to "Z" supra.

(9) If your answer to the preceding question is "no" state the method used in arriving at the price to be paid by the plaintiff to the defendant for each of said carloads of lumber shipped by the defendant to the plaintiff, as aforesaid, and produce your original books and records, together with all supporting documents showing your computation of the price of each of said carloads of lumber.

(10) You are required to produce all correspondence, records, or other writings or papers in your possession or under your control relating to:

(a) your original agreement with the plaintiff,

(b) plaintiff's claim of over-charge presented in or about February, 1947, and the disposition of said claim.

(11) State in detail the items included in the figure \$1,701 set forth in paragraph II on page 7 of your Answer and Counter-Claim and the figure of \$4,171.18 set forth in paragraph III on page 7 of your Answer and Counter-Claim, and produce your original books and records, together with supporting invoices or vouchers or other documents for each of said items.

(12) State in detail the names of the mills referred to, the arrangements alleged to have been made, and produce your original books, records, writings and papers relating to said arrangements referred to in paragraph III on page 5 of your Answer and Counter-Claim.

(13) In your deposition of February 17, 1949, in response to the following question "Now, will you describe the manner in which you arrived at the invoice prices?" you answered as follows: "I took the grades as I found them from the mill and I took the OPA schedule, or at least my clerk did, and he computed the price of lumber according to the prices established to rough grades as purchased. I didn't receive from the mill their prices, but I did receive their grades and their quantities, and their plant list, and I took their plant list, and I set the price in accordance with OPA schedule."

You are required to produce each and all of the "plant lists" therein referred to.

If some of the matters which you are asked to admit are correct in part and incorrect in part you will please frame your answers and state what parts are correct and what parts are incorrect.

Dated at Tacoma, Washington, this day of September, 1949.

JUSTIN N. REINHARDT,

FRED C. DORSEY,

Attorneys for Plaintiff.

O'BRIEN, DORSEY & RUFF

Attorneys and Counselors at Law

Puget Sound Bank Building

Tacoma 2, Washington

May 7, 1949

Henderson, Carnahan & Thompson

Attorneys at Law

1410 Puget Sound Bank Bldg.,

Tacoma, Washington.

Attn. Mr. Thompson.

Re: Portland-Columbia Lumber Co. vs. Feak.

Gentlemen:

I received a letter from my co-counsel at Portland, Justin N. Reinhardt, in connection with the above case and we are of the opinion that we desire to submit to you in a preliminary way, the question as to whether or not you are willing to stipulate at this time:

(1) That the invoices which I have in my possession and which you may see, being 26 in number were sent by the defendant to the plaintiff at the time that the 26 carloads of lumber were shipped to the plaintiff.

(2) That each of the 26 invoices cover one car of lumber shipped by the defendant to the plaintiff.

(3) That no other invoices were sent to the

plaintiff except the invoices being 26 in number, or if it is the contention of the defendant that he sent other invoices, for him to produce the same and have them also marked as exhibits.

(4) On page 61 of the deposition, lines 3 and 4, your Mr. Thompson stated "That was done at the request of Rothstein and it was not a real billing * * *." Will you have the defendant produce the real billing so that it may be marked as an exhibit.

(5) Can the defendant get up a detailed statement of the "computation" referred to by your Mr. Thompson on line 23 of page 60 and have the defendant produce the supporting documents for the purpose of having the same marked as exhibits including the documents referred to by Mr. Feak on lines 18 to 21 of page 14 of the deposition.

It is my thought that if we can stipulate with reference to the above matters it will go a long way toward working out a proposed pretrial order in the event the court feels that a pre-trial is necessary.

Yours very truly,

O'BRIEN, DORSEY & RUFF,

By /s/ FRED C. DORSEY.

O'BRIEN, DORSEY & RUFF
Attorneys and Counselors at Law

Puget Sound Bank Building
Tacoma 2, Washington

May 7, 1949

Henderson, Carnahan & Thompson
Attorneys at Law,
1410 Puget Sound Bank Bldg.,
Tacoma, Washington.

Attn: Mr. Thompson.

Re: Portland-Columbia Lumber Co. vs. Feak.

Gentlemen:

By reason of pressing matters that seem to have delayed me I am very late in requesting certain information which it was agreed upon at the time of the taking of Mr. Feak's deposition, would be provided.

Mr. Reinhardt must be becoming very critical of me by reason of the delay as it is now some time since he suggested that I write you.

This letter is being addressed to you so that in keeping with the understanding had at the time of the taking of the deposition and the matters concerning which we desire information are as follows:

(1) Will you please provide us with copies of all writings or correspondence now in Mr. Feak's possession, with reference to his original deal with Mr. Rothstein. These matters are referred to in lines 21 to 25, page 18, and line 1 on page 19, of Mr. Feak's deposition.

(2) Copies of all correspondence or other writings regarding the claim of overcharge that may have passed between Mr. Feak and Mr. Rothstein about February of 1947 as referred to in lines 13 to 25 on page 21 of the Feak deposition.

(3) The names of the mills referred to in paragraph 3 of page 5 of the answer, and the date that, and the persons with whom any "arrangement" was made; some mills were referred to by Mr. Feak in lines 10 to 12 of page 25 of his deposition, and he also stated that he would produce the names of others if his record showed them, this being on lines 20 to 22 of page 25 of the deposition.

(4) Will you please advise us of the manner in which Mr. Feak arrived at the figure of \$1701 as set forth in paragraph 2, page 7, of his answer and also how he arrives at the figure of \$4171.18 in paragraph 3 on page 7, together with copies of all records supporting the computation. This is referred to on pages 54 and 55 and also 56 of his deposition.

It may be that the plaintiff will avail itself of other offers to provide information or supporting data, but this is the only request we have to make at this time.

Yours very truly,

O'BRIEN, DORSEY & RUFF,

By /s/ FRED C. DORSEY.

FCD:k

[Endorsed]: Filed October 17, 1949.

District Court of the United States, Western
District of Washington, Southern Division

No. 1165

PORTLAND COLUMBIA LUMBER CO.,
Plaintiff,

vs.

J. W. FEAKE DBA J. W. FEAKE MERCANTILE
CO.,
Defendant.

VERDICT

We, the jury empanelled in the above-entitled cause, find for the Defendant and assess damages in the sum of \$5872.18.

Dated this 20th day of October, 1949.

/s/ JAMES L. ABSHER,
Foreman.

[Endorsed]: Filed October 20, 1949.

In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.

Civil Action, File No. 1165

PORTLAND COLUMBIA LUMBER COM-
PANY, a Corporation,

Plaintiff,

vs.

J. W. FEAKE, d/b/a J. W. FEAKE MERCANTILE
COMPANY,

Defendant.

JUDGMENT

This cause came on for trial before the Court and Jury upon the 17th day of October, 1949, the plaintiff appearing by its counsel, Justin N. Reinhardt and Fred C. Dorsey, and the defendant appearing in person and through his counsel, L. L. Thompson; a jury was duly impaneled and sworn; evidence was then introduced by the respective parties and after argument made to the jury by counsel for such parties the Court instructed the jury and the jury retired to consider their verdict; thereafter the jury returned a general verdict in favor of the defendant and for damages in favor of the defendant and against the plaintiff on the defendant's cross-complaint in the sum of \$5,872.18, which verdict was presented to the Court and duly received.

Now, Therefore, pursuant to said verdict, it is considered Ordered, Adjudged and Decreed as follows:

1. That plaintiff's action against the defendant be and the same is hereby dismissed with prejudice.

2. That the defendant J. W. Feak do have and recover judgment against the plaintiff, Portland Columbia Lumber Company, a corporation, in the sum of \$5,872.18 together with his costs and disbursements herein, to be taxed by the Clerk of this court. To which plaintiff excepts and exceptions allowed.

Done in Open Court this 31st day of October, 1949.

/s/ CHARLES H. LEAVY,
District Judge.

Presented by:

/s/ L. L. THOMPSON.

[Endorsed]: Filed October 31, 1949.

[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR NEW TRIAL

Now comes Portland-Columbia Lumber Company, plaintiff in the above-entitled cause, and moves this Court for an order setting aside the verdict and judgment herein and granting a new trial of the above-entitled cause for the following reasons, viz.:

I.

That the verdict is demonstrably contrary to the Court's instructions.

II.

That the verdict is contrary to the undisputed evidence.

III.

That the damages awarded are grossly excessive.

IV.

That the verdict is so excessive that it discloses prejudice or passion on the part of the jury.

This motion will be based upon the affidavit of M. Milton Rothstein, president of the plaintiff corporation, and upon all the evidence, files and records in said action.

In accordance with the provisions of Rule 62 of the Federal Rules of Civil Procedure, the above-named plaintiff, Portland-Columbia Lumber Company, further moves this Court for an order staying the execution of or any proceedings to enforce the judgment herein pending the disposition of the within motion for a new trial.

Dated: October 27, 1949.

/s/ JUSTIN N. REINHARDT,

/s/ FRED C. DORSEY,

Attorneys for Plaintiff.

Copy received.

[Endorsed]: Filed October 27, 1949.

[Title of District Court and Cause.]

TRANSCRIPT OF COURT'S
ORAL DECISION

Transcript of Court's Oral Decision in hearing on Plaintiff's Motion for New Trial in the above-named and numbered cause before the Honorable Charles H. Leavy, United States District Judge, on the 21st day of November, 1949, at Tacoma, Washington.

Appearances:

FRED DORSEY, ESQ.,
Tacoma, Washington,

JUSTIN W. RENHARDT, ESQ.,
Portland, Oregon,
Appeared for Plaintiff.

L. L. THOMPSON, ESQ.,
Tacoma, Washington,
Appeared for Defendant.

Proceedings

(Arguments having been made in support of and in opposition to motion, the following proceedings were had, to wit:)

The Court: The motion for a new trial, Mr. Reinhardt, will have to be denied.

In doing so, I think perhaps I should briefly, at least, state my reasons for denial of it.

The issues of fact in this case were submitted to a jury for disposition and their findings on the facts are binding upon all the parties, unless they be of

such a nature that the Court could clearly say that a gross injustice has followed. But I am unable to make such a determination in this case.

You rely largely upon Crow's Digest of Prices. It was admitted as an evidentiary matter and not as conclusive in regard to the material contained therein. It always remained a question of fact for the jury to determine whether they were going to accept the evidence contained in this Digest to the exclusion of all other evidence in the case, just as it was in their province and duty to determine the weight and credibility they could give to the witnesses who testified.

If the matter were so simple that we could have determined—the jury could have determined—the measure of [2*] damages purely upon the material contained in Crow's Digest, there would have been but a single issue to submit to the jury and that was whether the Plaintiff was guilty of a breach and the measure of damages would have been taken out of the hands of the jury, and that would have been plain error to have done so.

You further argue that there is no evidence in this record concerning the sale of the two carloads of lumber. I have no clear recollection of what the evidence was, but it is my remembrance that he did move it at the best price he could get, that that was the substance of his testimony, and if it weren't satisfactory to the Plaintiff it could have been elaborated on in cross-examination.

Whether he proved his damages to what would

* Page numbering appearing at top of page of original Reporter's Transcript.

have satisfied the Court if it were trying the case is quite a matter apart from satisfying the jury who must determine that issue.

The jury, by its verdict, found that the Plaintiff was not entitled to recover on its alleged breach of contract and they found that there was no breach on the first contract, and then they found that there was a breach on the second contract and that damages followed from that breach.

Now, as to just what evidence they gave weight [3] and consideration to in arriving at the measure of damages is something that none of us can say at this time.

There certainly was no direct evidence in this case that you could say the jury had to accept to the exclusion of other evidence that the Defendant, in the resale of this eighteen or twenty carloads of lumber, deliberately went out and sold it at a price substantially under the market price, or what he could have gotten for it then, so that we might now be able to take the position that he largely was responsible for the damages that he claimed. There is nothing in this record to support that position unless we accept Crow's Digest as complete and conclusive evidence and it never could be so accepted, either by court or jury, in a case of this kind because there are, literally, scores of factors involved in a transaction such as this was: The location of the material, and the type and character, and the quantity of the material, and the mental makeup of the individual who was placed in this position at the time he manufactured the lumber and had it on his hands and

was compelled, either for financial reasons or what, to go out and seek new buyers and make sales. It may be that a more capable and prudent lumber dealer would have sold at a better price and it may be, too, that a less capable one would have sold at a lesser price.

Still, there would be no bad faith shown and [4] there wasn't in this case that I can see and I shall have to deny the motion and allow you an exception.

Is there a judgment in this case?

Mr. Thompson: Yes.

The Court: And grant you not only such time as is allowed to file your motion—or notice of appeal—but, if necessary, time to get out a record. I will be extremely liberal in conceding that you should have additional time if there is any showing as to that.

Mr. Reinhardt: Thank you, your Honor. Will it be understood that there will be no execution pending the filing of the notice to appeal?

Mr. Thompson: Well, it is embarrassing to say, Yes. Your client is in good financial standing.

The Court: Of course, if you appeal you would have to put up a bond.

Mr. Thompson: Oh, I would let it run for a couple of weeks.

Mr. Reinhardt: Thank you.

The Court: Then you may prepare and submit an order denying the motion for a new trial and allow an exception.

(Whereupon, hearing in the above-named and numbered cause was completed.)

[Endorsed]: January 19, 1950. [5]

[Title of District Court and Cause.]

ORDER OVERRULING MOTION FOR NEW TRIAL

Be It Remembered that this matter came on for hearing upon the motion of the plaintiff for a new trial on the 21st day of November, 1949, and the Court having considered said motion and heard the argument of counsel, and having heretofore indicated its ruling upon said motion, and having directed that written order be prepared overruling said motion for a new trial and allowing an exception to the plaintiff,

It Is Hereby Ordered that said motion for a new trial filed by the plaintiff herein be and the same is hereby denied.

To which order and ruling the plaintiff excepts and its exception is allowed.

Done in Open Court this 20th day of January, 1950.

/s/ CHARLES H. LEAVY,
United States District Judge.

Presented by:

/s/ L. L. THOMPSON,
Attorney for Defendant.

Approved as to form:

/s/ JUSTIN N. REINHARDT,

/s/ FRED C. DORSEY,

Attorneys for Plaintiff.

[Endorsed]: Filed January 20, 1950.

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND
ON APPEAL

Know All Men by These Presents that we, Portland-Columbia Lumber Company, an Oregon corporation, and Century Indemnity Company, of Hartford, Connecticut, a corporation authorized to act as sole corporate surety under the laws of the State of Connecticut, are held and firmly bound unto J. W. Feak in the sum of Six Thousand Two Hundred (\$6,200.00) Dollars, lawful money of the United States, to be paid to him and his executors, administrators, successors and assigns, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and each of our successors and assigns by these presents.

Sealed with our seals and dated this 27th day of December, 1949.

Whereas, On or about the 31st day of October, 1949, at a regular term of this Court in the within proceeding, a judgment was entered in favor of the defendant, J. W. Feak, above named, and against the plaintiff, Portland-Columbia Lumber Company, above named, in the sum of Five Thousand Eight

Hundred Seventy-two and 18/100 (\$5,872.18) Dollars, and thereafter, on or about the 31st day of October, 1949, said plaintiff filed a motion for a new trial, which motion was denied on or about the 21st day of November, 1949, and the said Portland-Columbia Lumber Company having filed in the office of the Clerk of this Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment and order,

Now, Therefore, the condition of this obligation is such that if the above-named plaintiff, Portland-Columbia Lumber Company, shall prosecute its said appeal to effect and answer all costs and damages and pay the judgment of the District Court if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

PORTLAND-COLUMBIA

LUMBER COMPANY,

a Corporation,

By /s/ JUSTIN N. REINHARDT,

Its Attorney.

CENTURY INDEMNITY

COMPANY, a Corporation,

[Seal] By /s/ [Indistinguishable],

Its Attorney in Fact.

The within and foregoing bond is approved, both as to sufficiency and form, and is allowed as a supersedeas on this 20th day of January, 1950.

/s/ CHARLES H. LEAVY,

Judge.

[Endorsed]: Filed January 20, 1950.

[Title of District Court and Cause.]

ORDER APPROVING BOND

Plaintiff having filed a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit to review the judgment entered herein on the 31st day of October, 1949, in favor of the defendant, J. W. Feak, as against the plaintiff, Portland-Columbia Lumber Company, for the sum of Five Thousand Eight Hundred Seventy-two and 18/100 Dollars (\$5,872.18), with costs to be taxed,

It Is Ordered that the plaintiff, Portland-Columbia Lumber Company, having filed a damage, cost and supersedeas bond of Six Thousand Two Hundred (\$6,200.00) Dollars, approved by the undersigned, execution under such judgment be and it hereby is stayed until the final determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit and the coming down of its mandate to the United States District Court for the Western District of Washington, Southern Division.

Dated: January 20th, 1950.

/s/ CHARLES H. LEAVY,
Judge.

Approved:

/s/ L. L. THOMPSON,
Attorney for Defendant.

[Endorsed]: Filed January 20, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Portland-Columbia Lumber Company, a corporation, Plaintiff-Appellant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 31st, 1949.

/s/ JUSTIN N. REINHARDT,
Attorney for Plaintiff-
Appellant.

Copy received.

[Endorsed]: Filed January 20, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON

Plaintiff, Portland-Columbia Lumber Company, a corporation, proposes on its appeal to the Circuit Court of Appeals for the Ninth Circuit to rely upon the following points as error:

1. That the verdict is demonstrably contrary to the Court's instructions.
2. That the verdict is contrary to the undisputed evidence.

3. That the damages awarded are grossly excessive.

4. That the verdict is so excessive that it discloses prejudice or passion on the part of the jury.

/s/ JUSTIN N. REINHARDT,
Attorney for Plaintiff.

Copy received.

[Endorsed]: Filed January 20, 1950.

[Title of District Court and Cause.]

PETITION FOR EXTENSION OF TIME FOR
DOCKETING RECORD ON APPEAL

Comes now the above-named plaintiff, by Fred C. Dorsey and Justin N. Reinhardt, and respectfully represents to the Court:

That both of said named counsel represented the plaintiff in the District Court of the United States, for the Western District of Washington, Southern Division, at the time of the trial of the above-entitled cause.

That after reception of verdict and entry of judgment, counsel, Justin N. Reinhardt, has undertaken to appeal the verdict and judgment to the Circuit Court of Appeals, Ninth Judicial Circuit, and that in so doing, counsel, Fred C. Dorsey, has not joined.

That counsel, Justin N. Reinhardt, resides in the

city of Portland, Oregon, and has been giving such time as possible to the perfection of said appeal.

That said Justin N. Reinhardt was required to and did submit to an emergency appendectomy which required hospitalization and has caused the said Justin N. Reinhardt to be absent from his office and by reason thereof his preparation of said appeal has been delayed.

That 40 days have not elapsed since the filing of Notice of Appeal and the said Portland-Columbia Lumber Company, as appellant herein, respectfully requests that the Court grant an extension of additional time of 50 days beyond the usual 40 days allowed for the filing of the record on appeal.

Dated at Tacoma, Washington, this 21st day of February, 1950.

/s/ FRED C. DORSEY,

/s/ JUSTIN N. REINHARDT,
Attorneys for Plaintiff.

State of Washington,
County of Pierce—ss.

Fred C. Dorsey, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for the plaintiff, and makes this verification for and on its behalf for the reason that no officer of the plaintiff is present in Pierce County, Washington.

That he is familiar with the contents of the foregoing Petition for Extension of Time for Docketing

Record on Appeal, has read the same and the same are true and correct as he verily believes.

/s/ FRED C. DORSEY.

Subscribed and sworn to before me this 21st day of February, 1950.

[Seal] /s/ FRANK J. RUFF,
Notary Public in and for the State of Washington,
Residing at Tacoma.

Copy received.

[Endorsed]: February 21, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
APPEAL RECORD

This matter coming on regularly to be heard upon the petition of the plaintiff, Portland-Columbia Lumber Company, a corporation, appellant herein, for an extension of time for the filing of record on appeal, and the court having considered said petition, and being fully advised in the premises, it is by the Court

Ordered that the plaintiff herein, Portland-Columbia Lumber Company, a corporation, appellant, is hereby granted an extension of time of 50 days after the expiration of the 40 days for the docketing

of appeal and the filing of record on appeal, as provided in subsection G of Rule 73.

Done in Open Court this 21st day of February, 1950.

/s/ CHARLES H. LEAVY,
United States District Judge.

Presented by:

/s/ FRED C. DORSEY.

Receipt of copy acknowledged.

HENDERSON, CARNAHAN &
THOMPSON,
Attorneys for Defendant.

[Endorsed]: Filed February 21, 1950.

[Title of District Court and Cause.]

STIPULATION FOR TRANSMITTAL OF
PORTIONS OF ORIGINAL RECORD AND
ORIGINAL EXHIBITS

It Is Hereby Stipulated and Agreed by and between the undersigned, subject to the approval of the Court, that

I.

The record on appeal herein shall consist of the documents, testimony and exhibits enumerated in the designation of record filed herein by the plain-

tiff-appellant, together with such additions, if any, as are specified in the defendant-respondent's counter designation attached hereto, and the record so designated contains all the evidence adduced at the trial relating to the issue raised by this appeal, viz.: that the amount of the judgment entered herein is not supported by the evidence.

II.

For the purpose of this appeal, there may be transmitted to the Appellate Court the original record, including transcript, papers, exhibits, and all other matters before this Court in the within action to the extent designated by the parties in their respective designations of record on appeal filed herein or by this Stipulation, and in the event that the Court shall so order, the originals of such portions of record herein so designated shall be transmitted to the Appellate Court by the Clerk of this Court and no copies of any portions of the record so designated need be prepared, filed with this Court, or transmitted to the Appellate Court.

To the extent that this paragraph of this Stipulation may constitute an amendment to the designations of record on appeal, the same shall be deemed to be and are so amended.

III.

All exhibits transmitted to the Appellate Court pursuant to any of the foregoing may be considered

by that Court in their original form and need not be printed as part of the printed record on appeal herein.

/s/ JUSTIN N. REINHARDT,
Attorney for Plaintiff-
Appellant.

/s/ L. L. THOMPSON,
Attorney for Defendant-
Respondent.

[Endorsed]: Filed April 3, 1950.

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF PORTIONS
OF ORIGINAL RECORD TO COURT OF
APPEALS

This Matter coming before the Court upon a Stipulation providing interalia for transmittal to the Circuit Court for Appeals of certain portions of the original record herein, and the Court being fully advised in the premises,

It Is Hereby Ordered that those exhibits and other portions of the original record of the trial had before this Court herein which have been specified by either of the parties in their respective designations of record on appeal or in the Stipulation aforementioned be transmitted to the Appellate Court in lieu of copies of the same; and

It Is Further Ordered that the appellant need not file with this Court any copies of any of the matters so designated; and

It Is Further Ordered that no copies of the matters so designated shall be made by the Clerk of this Court or by any of the parties hereto; and

It Is Further Ordered that the Clerk of this Court, under his hand and the seal of this Court, shall transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit from the files of this Court, subject to the usual provisions for the safekeeping, transportation and return

thereof, the originals of the foregoing and of this Order.

Dated: April 3, 1950.

/s/ CHARLES H. LEAVY,
United States District Judge.

We consent to the entry of the foregoing Order:

/s/ JUSTIN N. REINHARDT,
Attorney for Plaintiff-
Appellant.

/s/ L. L. THOMPSON,
Attorney for Defendant-
Respondent.

[Endorsed]: Filed April 3, 1950.

[Title of District Court and Cause.]

PLAINTIFF-APPELLANT'S DESIGNATION
OF RECORD ON APPEAL

1. Complaint.
2. Answer.
3. Reply.
4. Pre-Trial Order.
5. Testimony of J. W. Peak and Frank D Barr.

6. All exhibits offered or received in evidence at the trial.
7. Judgment.
8. Plaintiff's Motion for a New Trial.
9. Opinion of the District Court on plaintiff's Motion for a New Trial.
10. Order Denying Plaintiff's Motion for a New Trial.
11. Notice of Appeal.
12. Supersedeas and Cost Bond on Appeal and Order approving same.
13. Plaintiff's statement of points to be relied upon.
14. Plaintiff's petition for an order extending the time for docketing record on appeal and order granting said extension.
15. Stipulation regarding record on appeal.
16. Designation of contents of record on appeal, including caption.
17. Certificate of Clerk.
18. Verdict of Jury.

/s/ JUSTIN N. REINHARDT,
Attorney for Plaintiff-Appellant.

[Endorsed]: Filed April 3, 1950.

In the District Court of the United States for the
Western District of Washington,
Southern Division

Docket No. 1165

PORTLAND, COLUMBIA LUMBER COM-
PANY, a Corporation,
Plaintiff,

vs.

J. W. FEAKE, Doing Business as J. W. FEAKE
MERCANTILE COMPANY,
Defendant.

PROCEEDINGS

* * *

JOHN W. FEAKE

the Defendant, called as a witness for and on behalf
of the Defendant, upon being first duly sworn, tes-
tified as follows:

Direct Examination

By Mr. Thompson:

* * *

Q. Previous to October, 1946, did you own any
standing timber? A. No.

Q. When did you acquire, if you did, a tract
known as [6*] the Sergeant tract?

* Page numbering appearing at top of page of original
Reporter's Transcript.

(Testimony of John W. Feak.)

A. I believe it was in the fall of 1946, but in any event it was in the year 1946—the latter half of the year.

Q. And where was that tract with reference to the town of Rochester?

A. It is about two miles from Rochester. [7]

* * *

Q. Now, what arrangements did you then make to prepare you to take care of this agreement that you say you had entered into?

A. Well, I went out to the woods mills and bought their lumber and paid for it. I had it transported to the remilling plant at Olympia Harbor Company, who remanufactured. I also had some shipped to Bucota, a remilling plant.

Q. What was the name of it?

A. Bucota Planing Mill.

Q. And Olympia Harbor?

A. Olympia Harbor, situated in Olympia and owned by the Anderson Brothers.

Q. And has operated for how many years?

A. Twenty-five (25) or thirty (30) years, I guess.

Q. Were you sufficiently informed to make any statement as to the general position of that concern in the industry and, if so, tell us?

A. At the time they were remilling for me they were one of the best mills in the industry. The operators had been in the business longer than most of the others.

Q. I wish you would give the Jury some idea of

(Testimony of John W. Feak.)

what these woods mills actually were. We call them mills. What were they? [11]

A. Well, a woods mill consisted of a head rig which was just one power saw and a carriage alongside of it on a derrick which pushed the log in and they were built to square up these smaller second growth logs. They manufactured lumber in this form. They would take a log with an eight (8) inch top and by squeezing and having a little bark on the corner they made a six by six. They only squared up those logs. They didn't cut it into lumber. They got the maximum amounts in even sizes in inches in one piece where possible. When they got into eighteen inch sizes they cut them into four or six inch cants, as large as they could, by hand. These mills had no planers or edgers or any convenient facilities for loading. They sometimes had a little shed but sometimes didn't cover the saw where the man that ran the saw worked for the operation. [12]

* * *

Q. Who logged your tract, the Sergeant tract?

A. These various mills who contracted to buy the stumpage.

Q. And did you charge—what did you charge them, more or less?

A. It was about the average prices at the time I made the agreement. It turned out to be much less. Stumpage went up. I sold at seven dollars (\$7.00)

(Testimony of John W. Feak.)

and that kind of stumpage went up to twelve dollars (\$12.00).

Q. The O. P. A. went off November 10th. Do you agree with that? A. Yes. [19]

* * *

Q. Now, what, if any, financial arrangements did you have with these small woods mills that you have testified about, Mr. Feak, after you made this arrangement with Mr. Powers concerning the delivery of this lumber to Mr. Rothstein?

A. I went out and paid them for lumber in advance with the understanding that they would cut lumber for me as it was ordered.

Q. And did they begin to cut it?

A. Yes, they did.

* * *

Q. You have been in the court room during this entire trial, have you? A. Most of it.

Q. And you heard the explanation given by Mr. Rothstein concerning the differences between these two types of exhibits in this A to Z of Plaintiff's Exhibit 4? A. Yes.

Q. First I want to ask you this question with respect to all the exhibits. There is included there a finished—yes, you have gone into that.

Q. Well, when and how were you first informed

(Testimony of John W. Feak.)

that Mr. Rothstein wouldn't take any more shipments?

A. I had bought five cars of lumber for Mr. Rothstein's account. The lumber car had come down and I was then willing to have it P.L.I.B.'d by the Pacific Lumber Inspection Bureau, which I did, and I invoiced them on the basis of the P.L.I.B., because I knew that I couldn't sell them otherwise at that time and I was willing to take part of the loss to get out and so I took my papers and got my sight draft drawn and called Mr. Powers up and told him I was shipping him five cars and he said, I just got through talking to Mr. Rothstein and he would not buy any more and I said he was obligated because I hadn't been notified that he didn't want to buy any more. He told me that I better get in touch with him direct because [27] he indicated he would not accept lumber from me. So that I got immediately in my automobile and I went down to Portland and I called Mr. Powers from Vancouver and I went out to the plant and Mr. Rothstein was not in the office and I went out to the mill where he was and I found Mr. Rothstein in the mill. He came back to the office and told me—I showed him the papers and my invoices and I asked him if he wouldn't reconsider his refusal to take the lumber—that he didn't want the lumber and that it wasn't satisfactory to him and that he wasn't buying lumber from me and I told him that I bought it for his account and that if he intended that he should have advised me before I

(Testimony of John W. Feak.)

went to the expense and trouble and he said I had no written order and therefore no claim of responsibility as far as he was concerned.

I had no written order it was true so that I was influenced by the remark, that he made. I told him, however, that the terms of our understanding had been such that I should hold him for any damages that I finally received by diverting these cars to another customer for what I had the right to expect from him. He told me I would not get any place asserting a claim against him and that he would not be responsible for any loss I took and he said he was going to assert a claim against me.

Q. Did he say for how much? [28]

A. He said for three thousand dollars (\$3,000.00). When I called Mr. Powers in Vancouver he told me that Rothstein expected to assert a claim of two thousand dollars (\$2,000.00) against me, but when I talked to Mr. Rothstein—between the time Mr. Powers talked to him and I reached there about noon—he had changed his price to three thousand dollars.

Q. Now, let me ask you whether there was another meeting on the same day, or a day or so later, at the office of Mr. Powers or Mr. Reinhardt?

A. There was not. I never saw Mr. Rothstein again.

Q. Just that one time?

(Testimony of John W. Feak.)

A. That is the only time, that I have any recollection of.

Q. He testified that this was agreed on at the mill the first time you saw him.

A. That was suggested to me but it was suggested to me by Mr. Powers, I would say, at least a week after I came back to Tacoma. I left Mr. Rothstein immediately because I had cars I had to get diverted to other customers and I had to get them back to where I could do it.

Q. Did Mr. Powers call you later?

A. Mr. Powers called me later and he told me. He was trying to work out some kind of settlement and Mr. Rothstein was insisting on some kind of action and I told [29] him I would have a claim against Mr. Rothstein because I told him first I would hold him for the loss on the five cars.

Q. Well, in any event, did you finally make the agreement reflected in these letters which were attached to the Amended Complaint and which you have seen, I take it?

A. Yes; I did, finally.

Q. And what preparation did you then make to perform this new agreement?

A. I put—I got the mills to cut four inch cants first, because Mr. Rothstein was anxious to get immediate delivery. He wanted me to agree first that I would sell him fifty cars in thirty days and I wouldn't agree to sell fifty cars in thirty days be-

(Testimony of John W. Feak.)

cause I didn't think I would be able to get that time——

Q. Just a minute. What was the difference in your first series of transactions and in the second arrangements that you had with Mr. Rothstein? Don't go into details but——[30]

* * *

A. In the first arrangement I found the lumber for [31] Mr. Rothstein's account and in the second I sold it to him.

Q. That isn't it. What physically happened? Listen to me. In the first transaction you found it or got it or bought it. We don't care. The rough lumber at the mill, didn't you? A. Yes.

Q. And you arranged for its transportation to the remilling plant? A. Yes.

Q. And after it was remilled you gave shipping directions, or at least supervised to some extent the remanufacture? A. Yes.

Q. And you advanced the money for all the transactions? A. Yes.

Q. That was the first transaction and for that you received a finders fee and a commission. Now, take the second transaction. What was that compared to the one I have described probably more than you have?

(Testimony of John W. Feak.)

A. I bought the lumber from the woods mills and had it delivered to a railroad siding and loaded on cars and had it shipped to Mr. Rothstein for a flat price. [32]

Q. How did he pay you on that?

A. In the same manner, sight draft attached to bill of lading.

Q. Was there any finders fee in connection with that?

A. No; a flat price.

Q. Forty-four dollars (\$44.00) a thousand?

A. Forty-four dollars a thousand.

Q. I think some of these letters written by Mr. Reinhardt say one, two, three and four inches of random widths and lengths and thickness—something like that. I am no lumberman. What does that mean, actually?

A. That meant that the lumber was to be—my arrangement was the same size, the same thickness. There was only one requirement. It was random everything except as to thickness. The lumber shipped on the cars had to be one, two, three and four inch and each shipment must contain the same thickness—the same as the former twenty-six cars.

Q. But there was no grade arrangement in the second deal?

A. No more than as formerly shipped.

Q. And the figures one, two, three and four had reference to the thickness?

A. It was mill run. [33]

(Testimony of John W. Feak.)

Q. It might get you confused with one, two three and four—better grades—but this was a mill run deal, was it? A. Yes.

Q. Now to go back to where I interrupted myself. What arrangements did you make to complete this contract?

A. I built a loading dock at the side track at Rochester. I financed thirty-five hundred dollars (\$3500.00) of machinery installation for Mr. James. I bought an edger for Mr. Hagerman to cut one and two inch lumber and put the other mills cutting three and four inch lumber to get early delivery.

Q. Now, explain the difference in the woods mills of equipment necessary to cut one and two inch lumber and three and four inch lumber, if you will.

A. It took this equipment—different equipment. A head saw could cut the slabs off the side of a log and not waste much of the log, but in manufacturing that into one and two inch lumber—those power saws in the mills are that big—they take up to one-half inch. So that, if you cut a one inch board, you lose. Whereas, if you cut the slabs off and you can get it into the mill and the saws which are very thin will enable you to get six one inch boards out of a six by six. But, if you try to get six inches of lumber out of a woods mill you waste a large part of the log. That meant that in order to get these mills to cut one and two inch lumber I had to put in the kind of machinery that wouldn't require them to handle too

(Testimony of John W. Feak.)

much log for so little lumber and put it through their head rigs in order to cut this thinner stuff. So that, what I did was to put the mills to cutting four inch cants. I had quite a struggle with Mr. Powers to get me to ship three and four inch lumber. That enabled me to make early shipments while I was getting these other mills set up, which was what they originally wanted. I went to this expense and there were loading arrangements and loading jacks and many other expenses that I went to. I made full preparations and was in full swing——

Q. Where was your loading point, by the way?

A. Rochester, Washington. Two miles from most of our mills.

Q. And who were the mills that you made arrangements with to keep this second transaction going?

A. The mill ~~that~~ was going to cut exclusively the one and two inch lumber was the Hagerman mill. I got the machinery for them to do that.

Q. And your first two car loads were what thickness?

A. The first two car loads were four inches in thickness.

Q. Now, your agreement there provided that you had [35] to have shipping instructions as to three and four, did you not? A. Yes.

Q. From Mr. Rothstein? A. Yes.

(Testimony of John W. Feak.)

Q But that in the absence of any instructions one and two were to go where?

A. Carlson Planing Mill, Vancouver.

Q. As to the first two, were you given shipping instructions by anybody?

A. Yes. Mr. Rothstein instructed—he had us send the four inch cants to the Carlson Planing Mill, which is where he had intended having the one and two inch go.

Q. And that was about what time, with reference to March 8, 1947?

A. I think the first car was shipped eleven days after March 8th. I think it was shipped March 19th. Loaded on the car and on its way March 19th.

Q. Can you approximate the time when your third car was ready for shipment?

A. I don't have that record. I could get it from the railroad company.

Q. Was it after April?

A. No; it was in the month of March, although there was great difficulty then in getting cars. [36]

Q. By this time state whether or not the plants upon which you relied to get the one and two inch cut were beginning to operate?

A. Yes. We had, we loaded two cars and had trouble getting our cars in for loading. There was a shortage of cars in the Northwest. We got a car loaded.

Q. That was on——

A. Four inch. On the loading dock and I had an-

(Testimony of John W. Feak.)

other car ready for loading. And then back of that on the ground I had between five and six cars of one and two inch as soon as I could get this other stuff out of the way.

Q. Did you ever ship the third car to Mr. Rothstein? A. I loaded it for him.

Q. It was never shipped?

A. I couldn't ship it. He refused——

Q. Why wasn't it shipped?

A. He refused to give shipping instructions and stated he wouldn't accept the car.

Q. Now you say he refused. Was that directly to you or through Powers?

A. I called Mr. Rothstein.

Q. Yes; tell us that conversation.

A. I told him I had another car and he wanted to know what thickness it was. He complained of the manner in which it was loaded, saying that the braces hadn't been [37] properly placed and it came in loaded badly and he had expected one and two inches and he wouldn't accept that car because it was four inch thickness and I told him I had one and two ready to ship, but that he had to take not only this third car but a fourth car before I could load one and two. He said he wouldn't take any one or two or three or four or anything else. The conversation ended so that I called Mr. Powers.

Q. Was there any statement by you to him as to

(Testimony of John W. Feak.)

what you intended to ship after all you had on the ground had been shipped?

A. I told him I had between five and six cars of one and two at the side track ready to load.

Q. You didn't make any statement about what would happen after that time?

A. I did later. I told them later I was ready, willing and able to perform the contract at any time.

Q. Did you ever, at any time, ever state to them that you would ship nothing but four's?

A. No; I did not. Quite the contrary.

Q. Now, at that time you say you had about how many thousand feet manufactured and ready for shipment at the shipping point?

A. I had more than one hundred thousand feet, because I had to pay the truckers on that basis to get it [38] away from there and into the milling plants.

Q. What was the—did you compute the average weight of the first two cars that you shipped?

A. I didn't compute the weight but I computed the footage.

Q. And that was how much?

A. I could refer——

Q. About how much?

A. It was about—a little over twenty-one thousand feet per car, rough lumber.

Q. And how much rough lumber ordinarily can you get on one of those cars? What is the spread of the variance?

A. It depends on the size of the car. You can get

(Testimony of John W. Feak.)

up to twenty-eight thousand feet of rough lumber on a car.

Q. Now, Mr. Feak, you say you had about one hundred thousand feet on the ground. Had you actually purchased, in order to fulfill this second contract, any rough lumber and, if so, how much?

A. I had purchased on the basis of the advances I had made the mills, I had purchased enough lumber to more than fill the order of twenty cars.

Q. And after this refusal of Mr. Rothstein to accept any further deliveries, were you compelled then to dispose of eighteen car loads of lumber which you had purchased to fill the order? [39]

A. Yes.

Q. And what, if any—strike that. What, if any, efforts did you make to dispose of this lumber which you had purchased?

A. I watched the lumber market which had gone into a decline. I tried to sell this in both Tacoma and Olympia Harbor and I tried to find other orders where I could have it remilled and disposed of and I finally sold, months later, the lumber that I had had transported to Tacoma. I had no place to leave it by the mill sites.

Q. All right. Go ahead. You sold it to whom?

A. To Bucoda and to the Olympia Harbor Lumber Company.

Q. And in order to do that did you have to make any additional expenditures for rehandling and transportation? A. Yes.

(Testimony of John W. Feak.)

Q. How much?

A. I would have to see my sheets but my recollection is around seventeen or eighteen hundred dollars for hauling.

Q. I see. And in the point of figures, from the time of this refusal, which was—you say—in the latter part of March, this refusal of Mr. Rothstein to take the third car, what was the general trend of the lumber market in that area with respect to this kind of lumber? [40]

A. Can I give the period?

Q. Yes; that is right.

A. In January——

Q. No. Don't go back.

A. The early part of March lumber had recovered and started upward. Demand and price was better. Well, I would say the demand was better which would influence prices.

Mr. Reinhardt: I would like to object to the witness testifying in general as to the lumber market——

The Court: Well, I am assuming that he is confining himself to the question as applied to the lumber here.

Mr. Thompson: Well, the market in the locality.

The Court: On this type of lumber.

Mr. Thompson: Yes; I am restricting it to that.

The Court: Yes; the witness should restrict his answer.

Q. (By Mr. Thompson): Go ahead, Mr. Feak.

(Testimony of John W. Feak.)

A. This type of lumber is not simple——

The Court: Without explaining, just state the fact whether this lumber was holding its own or dropping or climbing.

The Witness: It climbed a little the first part of March. [41]

Q. (By Mr. Thompson): And——

A. And sagged towards the end.

Q. Sagged to what extent? To a base price of forty-four dollars (\$44.00) a thousand that you had agreed upon, was it up or down from that base point?

A. It was way down.

Q. Well, indicate in figures, if you can.

A. Some mills were selling that same kind of lumber at the end of March, and glad to get it, at (\$35.00) thirty-five dollars.

Q. Yes.

A. Two months later Bucoda stated they were willing to pay twenty-two (\$22.00) or twenty-eight (\$28.00) dollars, depending on grade and length, but they did better for me.

Q. And what did you finally get for it?

A. I finally got thirty-two fifty (\$32.50) for some two hundred thousand feet that I took to Bucoda.

Q. I want to ask you how you computed your alleged damage here, Mr. Feak, in addition to the transportation charges?

A. As I say, I had bought more lumber than it took to fill the twenty car order. I sold part

(Testimony of John W. Feak.)

to Olympia Harbor at a better price than I received from Bucoda. I first took [42] the average between the two cars accepted and it came to something over twenty-one thousand (21,000) feet per car. They were small cars but I thought that inasmuch as I was computing my losses I should confine my claims to the average amount that they had accepted, so they got the little the best of it on that basis. I computed my basis on 425,251 feet which they refused to accept.

Q. Which made a damage of how much?

A. The damage consists of \$1701.00 for hauling and \$3333.89 for the difference between what I received from Olympia Harbor for the part they took. And two per cent discount, I took \$21.40, and two per cent on another item, \$75.97. And that price to Mr. Rothstein was net. And at Bucota, where I hauled several hundred feet—there was sixty-four thousand left after grading. Then there was the higher priced lumber that I had sold to Olympia Harbor. I then charged them for the loss that I took on the lumber it took to make up the 425 thousand. I sold to Bucoda at \$32.50 a thousand. At \$44.00 I would have received \$2831.00 but I received \$2091.08, to make a difference of \$739.92. The total is \$5872.18.

Q. That includes the transportation items?

A. That includes the transportation items but it doesn't include the cost of building the dock or

(Testimony of John W. Feak.)

wrecking it or any of the credit loss that I sustained. [43]

The Court: I think we will suspend at this time.

Mr. Thompson: I would like to have marked as an exhibit this paper to illustrate the testimony of the witness on the same theory as the other.

The Court: Yes. It will not be an exhibit as proof of anything.

Mr. Reinhardt: May I inspect this before——

The Court: Yes. I understand it is merely a compilation of damages made up by this Defendant in the aggregate. You may look at them. We will adjourn Court until ten o'clock tomorrow morning. [44]

* * *

Mr. Thompson: At the adjournment of Court yesterday I submitted a calculation of Mr. Feak's to illustrate the damage for the same purpose as you permitted that on the other side.

The Court: Have you examined it?

Mr. Reinhardt: There is only this distinction between the two documents. The one before was based on documentary evidence and this is not.

The Court: This is based upon the testimony of the witness.

Mr. Reinhardt: On the oral testimony.

The Court: Well, it is not being admitted as evidence but merely to be submitted to the Jury so that they may better know the contentions of the parties.

(Testimony of John W. Feak.)

[See pages 124 to 126 of this printed record for unnumbered tabulations used during trial of cause.]

Now, you may proceed. [45]

* * *

Q. Is there a publication known as Crow's Digest which has a general circulation in the lumber industry? A. Yes.

Q. And state generally what that is. Don't go into any details but what is the extent of the circulation, if you will.

A. Well, it is used throughout the lumber industry as an authority respecting prices and conditions.

Q. State whether or not it has a general circulation in the Pacific Northwest.

A. Throughout the full length of the Pacific Coast, as a matter of fact.

Mr. Thompson: I believe it is stipulated, Counsel, that these Price Digests need not be authenticated?

Mr. Reinhardt: That is correct.

Mr. Thompson: We offer these Digests in evidence, if the Court please.

The Court: There is no objection, I understand?

Mr. Reinhardt: No objection.

The Court: They will be marked as a single exhibit and admitted.

The Clerk: Defendant's Exhibit Number A-4 marked for identification and admitted in evidence.

(Testimony of John W. Feak.)

(Document referred to marked Defendant's Exhibit Number A-4 for identification and admitted in evidence.) [50]

* * *

Cross-Examination

By Mr. Reinhardt:

All right. I would like to have this marked, your Honor.

The Court: Is that an exhibit in the pre-trial——

Mr. Reinhardt: Yes, your Honor.

The Clerk: Plaintiff's Exhibit 8 marked for identification.

(Document referred to marked Plaintiff's Exhibit Number 8 for identification.)

Mr. Thompson: Are you offering it?

Q. (By Mr. Reinhardt): Mr. Feak——

Mr. Thompson: Go ahead.

Mr. Rheinhardt: It is admitted that this was written?

Mr. Thompson: Yes.

Mr. Reinhardt: This was authenticated?

Mr. Thompson: Yes.

Q. (By Mr. Reinhardt): Mr. Feak, on June 3, 1947, you wrote me a letter in answer to a letter from me.

The Court: You better have it admitted.

Mr. Reinhardt: I will offer it in evidence. I am sorry.

(Testimony of John W. Feak.)

Mr. Thompson: No objection. [74]

The Court: It may be admitted.

(Document previously marked Plaintiff's Exhibit Number 8 for identification received in evidence.) [75]

* * *

Q. Now, Mr. Feak, as I recall your testimony yesterday, you said that you had telephoned Mr. Rothstein between March 20th and March 30th, 1947, to ask him for shipping instructions on your third and fourth cars of four inch lumber. This is on the twenty car deal; is that right?

A. I called him? I don't know what I said. I suppose I did if I was asked the question.

Q. That is what I want to get clear in your mind.

A. I called Mr. Rothstein on the third car, the same as the first two.

Q. And that was between the 20th and 30th of March? A. Yes.

Q. And he told you he wasn't going to take any more four-inch lumber?

A. Yes; he refused to give me shipping instructions and said he wouldn't take any more lumber.

Q. That is what I want to talk to you about. You say that in that same conversation he said that he wouldn't [76] take—strike that. You said yesterday, Mr. Feak, that in that same conversation you told Mr. Rothstein you had five cars of one and

(Testimony of John W. Feak.)

two-inch lumber stacked behind these cars of four-inch lumber; is that right?

A. Yes; I told him I had a lot of it.

Q. Ready for loading? A. Yes.

Q. And he said he wouldn't take those either?

A. Yes, as I remember he did. I am not right clear on that. It might have been Mr. Powers. I did talk to Mr. Rothstein on the third car and I am positive I told him I had another car of four-inch and he refused to take it.

Q. What happened to the one and two-inch?

A. As I recall, I told him I had a lot of one and two-inch and it might have been Mr. Powers.

Q. What I want to get at is this: Did you know on that day, whether after your conversation with Powers or Rothstein, did you know on that day that you weren't going to ship any one and two-inch lumber to Mr. Rothstein?

A. I had it ready to ship. Does that answer your question?

Q. I don't think so. Did Rothstein then indicate to you that he wouldn't take one and two-inch lumber?

A. My recollection is that he did, that either Mr. Powers or Mr. Rothstein said he wouldn't take one and two-inch [77] and I am almost positive that Mr. Rothstein would not take any more lumber and he blamed it on the way in which the second car had been loaded and not on thickness. I might have had two conversations with him.

(Testimony of John W. Feak.)

Q. If there were two conversations, this was on the same day?

A. No, sir; in connection with the same matter, the third car.

Q. Well, was it on the same day, that is what you testified?

A. I couldn't say as to that.

Q. That is what you testified to yesterday?

A. There were several conversations that day over the telephone. I spent a lot of money on phone calls. I was in a bad spot and the car was loaded and had to move some place.

Q. Very well. But you are clear that you did tell Mr. Rothstein at that time that you had these other five cars of one and two-inch?

A. My sincere belief is that I did.

Q. You did?

A. Yes, I am very confident that I did. I am quite sure that I told both Mr. Powers and Rothstein, but I know I told Mr. Powers.

Q. And that was in that first conversation about this [78] third car of four-inch lumber?

A. Well, it was in the conversation where I asked for shipping instructions on the third car.

Q. That is what I am getting at. A. Yes.

Q. Now, I would like to refer to your letter of June 3rd, Exhibit 8, in which you said to me: "The premise upon which your client refused the third car was that it was four inches thick." That doesn't conform to your present recollection, does it?

(Testimony of John W. Feak.)

A. Oh, yes, it does. That entered into it. Everything entered into it. Thickness and loading an—

Q. All right. "Your order to me included four-inch lumber." Now, listen to the rest of this: "Endeavoring to comply with his changing mind, I began the manufacture of one-inch and two-inch lumber." Now, is that true? A. That is true.

Q. You then began the manufacture of one and two-inch lumber?

A. That had reference—that had reference to a former time. I started that right off the bat.

Q. I will read this again: "Endeavoring to comply with his changing mind, I began the manufacture of one-inch and two-inch lumber." Did you?

A. I remember. I can quote it for you if you want [79] me to. I think pretty closely.

Q. "The premise upon which your client refused the third car was that it was four inches thick. Your order to me included four-inch lumber. Endeavoring to comply with his changing mind, I began the manufacture of one-inch and two-inch lumber."

A. I did begin the manufacture of it.

Q. You did? Did you begin it before or after you had this conversation with him about the third car of four-inch lumber?

A. I began it before.

Q. You did? And you think that is what this letter says?

A. I began the manufacture of it.

(Testimony of John W. Feak.)

Q. Please answer that yes or no.

A. Yes, it does.

Q. It does? Then you stand on your testimony that you did have those five cars of one and two-inch lumber stacked and ready for loading when Rothstein refused the third car of four-inch?

A. Yes; I did.

The Court: It is now time for the morning intermission, so that we will take a recess of fifteen minutes.

(Whereupon the jury retired, and at 11:00 o'clock a.m., October 19, 1949, a recess was had until 11:15 o'clock a.m., October 19, 1949, at which time, jury and counsel heretofore noted being present, the following proceedings were had, to wit:)

The Court: Now you may proceed.

Q. (By Mr. Reinhardt): Mr. Feak, did you testify when I was questioning here that you went to the O.P.A. and got their approval in connection with the price tally understanding that you were talking about?

A. I went to the O.P.A. a number of times in Seattle and I was told that handling it in this manner was within the regulations.

Q. Did you do that in connection with the price tally understanding?

A. I don't know that I discussed with them. I

(Testimony of John W. Feak.)

asked how I could charge five per cent finders fee.

Q. I don't want to go into that. Just answer the question I asked. A. Pardon me.

Q. You say you did not?

A. I don't recall that I did.

Q. I don't know whether that had been your testimony or not. Now, going back—or one other thing, Mr. Feak—I think you testified that Mr. Risch tallied this lumber as it went on to the green chain? [81] A. Yes.

Q. What is the green chain? This is in the remanufacturing mill? A. Yes.

Q. What is the green chain?

A. It is a travelling chain on which the lumber is dumped and the chain picks it up a piece at a time and carries it over a platform and drops it down where it goes through the resaw. It travels about fifteen or twenty feet in that process.

Q. Is the green chain the beginning or end of the remanufacturing process?

A. At the beginning.

Q. It is not where the finished lumber comes out?

A. No; it isn't.

Q. What do you call it then where the finished lumber comes out? A. What is that?

Q. What do you call the mechanism on which the finished lumber comes out?

A. It comes out on the same type of travelling conveyor.

(Testimony of John W. Feak.)

Q. Is that a green chain, too?

A. There is a floor——

Q. I understand that. I am just asking for the name [82] of the equipment at the finished end that corresponds to the green chain at the rough end.

A. I don't know what they call it.

Q. You don't know? All right. Now, just before the recess, Mr. Feak, you were on the question of the status of the five cars of one and two-inch lumber at the time you requested instructions from Rothstein about the third car of four-inch and your testimony was that those five cars of one and two-inch lumber were then stacked behind the cars of four-inch?

A. The one and two-inch, something over one hundred thousand feet.

Q. That was stacked there at the time you asked Rothstein for instructions of the car of four-inch?

A. Yes, sir. It wasn't there probably at the time the third car was ready but before I found that I had to transship it to someone else. I stopped it when I found out he wasn't going to take it.

Q. But there was a substantial quantity there before you found out he wouldn't take the third car?

A. Oh, yes.

Q. In your letter of June 3rd, again, which you wrote me, after I told you this law suit would be filed, you said, "Endeavoring to comply with his

(Testimony of John W. Feak.)

changing mind, I began the manufacture of one-inch and two-inch lumber [83] and when a number of carloads were at the sidetrack ready for loading, I called Mr. Powers and asked him to check with Mr. Rothstein to be sure he hadn't changed his mind again." Do you remember writing that? A. Yes.

Q. Now, isn't it true that that indicates that the first time this one and two-inch lumber wasn't stacked there?

Mr. Thompson: I object to that as argumentative.

The Court: Objection sustained.

Q. (By Mr. Reinhardt): Now, actually, Mr. Feak—actually, Mr. Feak—there wasn't any occasion for you to talk either to Mr. Powers or to Mr. Rothstein about one and two-inch lumber in connection with these twenty cars, because, if I understand you correctly, under your arrangement with him, the one and two-inch lumber was supposed to be shipped to the Carlson's mill in Vancouver; isn't that right?

A. It is true that the one and two-inch was to be shipped to the Carlson's mill, but it is not true that there was no occasion to call.

Q. But you didn't know where you could ship the three and four-inch lumber, did you?

A. I had to get shipping instructions on the three and four-inch. [84]

(Testimony of John W. Feak.)

Q. So that there was reason to talk about the three and four-inch lumber, wasn't there?

A. Yes. There was reason to talk about all of it when he refused to take any of it.

Q. And isn't it true that throughout the negotiations you had with Mr. Rothstein that resulted in this arrangement for the delivery of twenty cars, that Mr. Rothstein always stressed the fact that what he was most anxious to get was one and two-inch lumber?

A. If you admit that Mr. Powers was his agent, yes. I didn't see Mr. Rothstein in connection with this deal at all.

Q. In connection with what deal?

A. This twenty-car deal.

Q. You didn't see him in connection with that at all? A. No.

Q. I thought yesterday you testified you said you saw Mr. Rothstein out at his mill?

A. He said then definitely he would not take any more lumber from me and he didn't propose that I sell him any whatever.

Q. That was before the twenty-car deal?

A. Yes.

Q. So that there was no discussion between you and [85] Mr. Rothstein regarding this twenty-car deal? A. No.

Q. At any time?

A. Not directly with him, except through Mr. Powers and you.

(Testimony of John W. Feak.)

Mr. Thompson: When you say "at any time," Counsel—he testified as to telephone conversations.

A. (Continuing): Except after the twenty-car deal was consummated. And then I had to get shipping instructions. Mr. Powers washed himself out of the deal so then I talked to Mr. Rothstein. [86]

* * *

Q. (By Mr. Rheinhardt): Now, Mr. Feak, I think yesterday you testified that you advanced two thousand dollars to Hagerman so that [89] he could install an edger in a mill?

A. No; I bought one and sold it to him.

Q. You bought one and sold it to him?

A. He hasn't paid for it; he hasn't paid for it yet.

Q. I see. A. But I paid for it.

Q. Yes. What size cutting edge did that edger have?

The Court: I don't think you need to devote much time to that. That isn't an item of claimed damages, is it?

Mr. Thompson: No, we didn't base any claim for damages on that. That was part of the oral picture that the witness testified to. We make no claim to that.

Mr. Reinhardt: I think it has some significance, your Honor.

The Court: Not sufficient—we have too many matters here that are direct without getting too far afield.

(Testimony of John W. Feak.)

Mr. Reinhardt: Thank you.

Q. (By Mr. Reinhardt): Mr. Feak, when did you start dealing with the mills we mentioned before that supplied the lumber that you shipped to Rothstein?

A. I started dealing with the James mill in April, 1946. With Harrington about one month later. With Brink several months later. [90]

Q. Well, can you be more explicit than that?

A. No; I can't.

The Court: Oh, I think that is sufficient. The point you wanted to show is whether he was dealing with these mills before?

Mr. Reinhardt: Yes.

Q. (By Mr. Reinhardt): You were dealing with all these mills before you got this order in October? A. Yes; that is true.

Q. You said you had advanced money to all these mills?

A. I kept them owing me lumber all the time.

Q. And that was from the very beginning of your dealings? A. Yes.

Q. Now, did that continue throughout the entire period of your dealings with them?

A. In a general way; yes.

Q. In general, you always prepaid them for lumber?

A. That was how I was able to buy it, and the others couldn't because we all paid the same price.

Q. I didn't get that.

(Testimony of John W. Feak.)

A. Nobody was allowed to pay more than a certain price and I paid cash. Everybody wanted to get lumber. [91]

Q. Now, did you take their entire output?

A. No.

Q. Did you take any lumber from them except the lumber that they cut from your stumpage?

A. Yes.

Q. A substantial amount?

A. According to my definition of substantial.

Q. In relation to the amount that they cut from your stumpage, was it more or less?

A. Well, you would have to name the mills.

Q. Well, all right.

A. It varied.

Q. Now—well, you said Mr.—who was the fellow that you sold the edger to?

A. Mr. Hagerman and James.

Q. Hagerman is still indebted to you, isn't he?

A. Yes.

Q. Are these others indebted to you?

A. Mr. James owes me a balance but there is a man paying it out so much a thousand on the mill cut. That is taken care of. I made a settlement with him. I would say Mr. James doesn't owe me any money.

Q. But all the others do?

A. Hagerman does; yes.

Q. Do any of the others? [92]

(Testimony of John W. Feak.)

A. Neimi owes me a small balance, I believe.
Who else furnished? Harrington?

Q. Yes?

A. Yes; Harrington owes me money.

Q. Cordell? A. Yes.

Q. Brink? A. Yes.

Q. Is that all except——

A. Practically all those mills owe me money because we all ran out of money when Rothstein didn't——

Q. We are not interested in the reason why.

Mr. Thompson: I submit that the witness should be allowed to answer.

The Court: He has gone on enough. I can't quite see the relevancy of the interrogation on this particular line. It might have some bearing on the damages, if any, to be coming to this witness but it isn't getting directly to the matter of what loss he sustained, or claims he sustained.

Q. (By Mr. Reinhardt): Now, if it is true, as you say, Mr. Feak, that these mills were always indebted to you for lumber during this period, you didn't actually go out and buy lumber expressly for Rothstein? [93]

A. In the instances where I shipped it for him I would say I did.

Q. You would say you did, but the fact is that whether you had had this order from Rothstein or

(Testimony of John W. Feak.)

not, you would have been receiving lumber from these mills?

A. I would have tried to find other buyers; yes.

Q. That is right; but you were in the position where the mills were obligated to deliver lumber to you?

A. Not necessarily. In some cases. Only when I paid them the full price.

Q. Yes. But, in any case, I think you testified that you had advanced money to these mills as prepayment for lumber; is that right?

A. That is the way I advanced it.

Q. All right; and that you had done that long prior to October, 1946?

A. That is true; but they were——

Q. So that—so that, whether you had gotten this order from Rothstein in October, 1946, or not, you would have been getting lumber from the mill—yes or no, Mr. Feak?

A. I don't know.

Q. But in any case, you had paid them for lumber?

A. I had advanced them money, which would be redeemable in lumber or the return of my money.

Q. And further, some at least, of the lumber that these mills were delivering to you came from logs that were cut from your timber stand; isn't that right?

(Testimony of John W. Feak.)

A. It came from logs which I sold—standing timber which I sold—to these fellows' mills.

Q. It was your timber?

A. It was before I sold it to the mills.

Q. Originally?

A. At the time it was cut it was not my timber.

Q. I am not getting into legal niceties but, the mill paid you for the logs they took out of your stand of timber?

A. That is right.

Q. And those are the logs that these mills cut and then they delivered the lumber to you?

A. Yes.

Q. And they would have done that whether you got this order from Rothstein or not?

A. Very likely they would have. There is no certainty, however, that they would have.

Q. Were they still cutting your timber in March, 1947?

A. What time in March?

Q. Anytime in March?

A. Yes; they were all cutting, as I remember, at that [95] time except—with the possible exception of—Neimi.

Q. They were all cutting your timber at that time?

A. No. Mr. Harrington was not cutting my timber.

Q. Was he delivering lumber to you in March, 1947?

(Testimony of John W. Feak.)

A. Yes.

Q. What about the other lumber that was being delivered to you in March, 1947?

A. Mr. James——

Q. Well, was some of it from your stumpage?

A. Some of it was; yes.

Q. Now, I don't recall definitely, Mr. Feak, but did you testify that the stumpage you received from these mills was below the price that you could have received from other mills?

The Court: You mean the lumber, not the stumpage.

Mr. Reinhardt: No. The stumpage, when they bought his stumpage.

The Court: The stumpage he sold?

Mr. Reinhardt: That is right. He owned the timber.

The Court: He says he sold the stumpage to the mills that were cutting.

Mr. Reinhardt: Let's get it clear.

The Court: Is that the statement you made?

The Witness: Yes; your Honor.

The Court: Yes; that is very clear. You would be confusing when you confuse stumpage with lumber.

Mr. Reinhardt: I would like to get this clear in my own mind, if I may.

The Court: We will have to move along because the Court can't take an indefinite time on cross-ex-

(Testimony of John W. Feak.)

amination. We have been at it for some time. Do you desire to ask him again? It is very clear in the mind of the Court, and, I think, in the minds of the Jury what he testified to. Whether it is a fact or not is for the Jury to determine, but if you want to ask him again whether he retained the stumpage——

Mr. Reinhardt: Well, in order, your Honor, to determine whether what he says is true, I would like to have him state something on which I can question him.

The Court: Well, propound your question, Mr. Reinhardt, so that we can get along.

Mr. Reinhardt: Yes.

Q. (By Mr. Reinhardt): As I understand it, Mr. Feak, you owned a stand of timber called the Sergeant tract; is that right?

A. I bought it and owned it originally.

Q. Yes. Now, am I correct in understanding that these mills, that you say cut your timber, or cut logs from [97] your timber, paid you for the privilege of going into the woods that you owned and cutting those trees into logs and taking them into your mill to cut?

A. They bought the timber—the standing trees—and paid me as they cut it seven dollars (\$7.00) a thousand.

Q. That is what I am trying to get at. So that, when they took these logs they paid you seven dollars a thousand for the logs; is that right? A. Yes.

Q. And the logs they paid you seven dollars a

(Testimony of John W. Feak.)

thousand for they cut into boards and they delivered you the boards?

A. That is true. They sold them back to me.

Q. That is what I understood and wanted to get clear in my own mind. Now, did you or did you not testify yesterday that the money that these mills paid you for those logs—that is the seven dollar figure—was less than what you could have gotten from somebody else?

A. I testified—I so testified.

Q. You did? Was that true in March, 1947?

A. I think so.

Q. Now, if that was true in March, 1947, and if it was true that Mr. Rothstein refused to take any more of your lumber in March, 1947, then you would have profited by that to the extent that you could have sold your logs for more [98] than you were getting from these mills. Isn't that right?

A. No; that isn't.

Mr. Thompson: I will object to that as argumentative.

The Court: I will have to sustain the objection as argumentative. [99]

* * *

Q. Now, Mr. Feak, yesterday—this morning—a stipulation was presented here purporting to show your sales of this lumber that you had planned to send to Rothstein. Is that essentially what this is?

A. Yes.

(Testimony of John W. Feak.)

Q. The dates on here are from June 9th to August 27th; is that right?

A. I don't know. If you show it to me I will tell you.

(Document handed to witness.)

A. (Continuing): The dates given here——

Q. Well, just answer my question. A. Yes.

Q. Yes; they do. Does that mean that you sold this lumber between those two dates?

A. Yes, I sold it. I hauled it to the remilling plant and finally sold it to the remilling plant. Some of it had lain there for months, of course.

Q. Is it your statement that you were unable to sell any of this lumber before June 9th? Just yes or no, Mr. Feak?

A. Yes; at the price I finally received. [103]

Q. In other words, at any time prior to June 9th it would have been impossible for you to sell this lumber for \$32.50 a thousand, or more?

A. I got forty dollars for it.

Q. Yes or no, Mr. Feak?

A. On part of it, yes, on part of it, no.

Q. All right. Now, I take it then that you refer to the fact that part of this was sold at \$32.50 and part at \$40.00? A. Yes.

Q. Now, as to the part sold at \$32.50, is it your statement that you could not have sold that for

(Testimony of John W. Feak.)

\$32.50 or more prior to—what was the date of that sale?

A. That sale was—I don't have the dates of the sale here. My bookkeeper is here. He could give it to you. You can ask him.

Q. Well, but it wasn't before June 9th?

A. No; it wasn't.

Q. Was it before July 9th?

The Court: He says he doesn't know, Mr. Reinhardt, and we will just put in a lot of time.

Mr. Reinhardt: All right.

Q. (By Mr. Reinhardt): Now, Mr. Feak, going back, you testified that you had seven cars of this lumber ready around March 19th, [104] or 20th? Isn't that right? The two cars of four-inch and the five cars of one- and two-inch? A. March 9th?

Q. 19th? A. No; I didn't say that.

Q. Well, when were those ready?

A. Sometime after the third car was refused, which was later than March 20th.

Q. After the third car was refused.

A. Yes.

Q. Well, then, is it true that when the third car was refused you did not have the five cars of one-inch ready for loading?

A. No, at the time the third car was refused, and I new there was no hope of getting Mr. Rothstein to take it, there was that much lumber accumulating and further shipments to the side track were stopped

(Testimony of John W. Feak.)

simultaneously with the knowledge that Mr. Rothstein would not take the third car.

Q. Now, I go back to the early part of our session this morning and ask you if you did not then say, and also yesterday, that Rothstein refused the one- and two-inch lumber that you told him was ready and piled up on the siding when you asked him for shipping instructions on the third car of four-inch lumber? A. That is right. [105]

Q. Well, was it there or not at that time?

A. It was there, but as I say it kept moving in.

Q. It was there on March 9th when you asked for shipping instructions? A. No, it was not.

Q. When did you——

A. I shipped my first car on the 19th.

Q. And when did you ship the third car?

A. Late March or early April, because there was a car shortage.

Q. And you testified yesterday it was late in March, not later than March 30th.

A. I will let that answer stand. If you want definite records, I will get them for you.

Q. This is satisfactory for me. So that the last seven cars of lumber were available by March 30th, weren't they? A. Nine cars.

Q. Nine cars? A. At least nine cars.

Q. And the rest of them came in pretty fast after that because, I think, you testified by that time all the mills were set up and rolling; isn't that right?

A. No; I didn't testify to that and that wasn't exactly the fact. [106]

(Testimony of John W. Feak.)

Q. That wasn't exactly the fact, but it was contemplated in any case in your arrangements regarding this twenty-car deal that all the twenty cars would be delivered within thirty days, if possible?

A. Yes.

Q. And that was one of the reasons why this business about the four-inch was added, isn't that right, so that you could deliver within approximately thirty days? A. Yes.

Q. And that thirty days started running March 11th?

Mr. Thompson: I think I will object to that on the grounds that it violates the oral evidence rule because the written letters definitely set forth that date.

The Court: Objection overruled.

Q. (By Mr. Reinhardt): So that, if you were——

The Court: Avoid, as much as you can, what would be in the nature of argument.

Mr. Reinhardt: Yes.

Q. (By Mr. Reinhardt): If you were to have complied with this arrangement substantially all the lumber would have been available by April 11th, approximately? A. Substantially; yes.

Q. Now, these Crow's Reporters have been introduced. [107] Now, you have those Reporters for the period March 20th, I believe, to May 29th; is that right? A. Yes.

Q. Now, in those pamphlets is there any place

(Testimony of John W. Feak.)

where the going market price for this kind of lumber is indicated?

Mr. Thompson: I object to that on the grounds that the pamphlets are the best evidence of what they contain.

The Court: He may answer, but you can get to the thing much easier if you had checked it out for him and wanted to show that the price was a certain amount rather than have the time consumed. You have something in mind there, don't you, Mr. Reinhardt, about the price of lumber which is in there? I don't want to go into detail because those documents go to the Jury.

Q. (By Mr. Reinhardt): Now, for the March 20th pamphlet, it shows the price range is forty dollars to fifty dollars, with most sales at forty-two dollars. April 3rd, thirty-eight to fifty-five dollars; most sales at forty-two dollars to forty-five dollars. May 1st, thirty-five dollars to forty-five dollars. May 15th, thirty-five dollars to \$47.50. And, May 29th, thirty dollars to forty-two dollars.

A. That last clause there explains that.

Q. Well, I won't mention that. [108]

A. All right.

Q. Those figures indicate the market during those respective periods, do they not, Mr. Feak?

A. They indicate a falling market; yes.

Q. Whether it was rising or falling, those were the prices at which transactions occurred during that time, weren't they?

A. I assume so.

(Testimony of John W. Feak.)

Q. (By Mr. Reinhardt): Mr. Feak, just to make it sure as I understand it, you claim that you had one hundred thousand feet of this lumber ready for loading — whenever it was—when you learned that, you say, Mr. Rothstein told you he wouldn't take any one and two inch; is that right?

A. Yes.

Q. Now, this stock was stacked at Rochester at your siding at Rochester?

A. Most of it was stacked there but it was all there by the time I knew he wouldn't take any more.

Q. That is right. Now, you have an item in your computation of alleged loss of loss in the cost of hauling for 425 thousand feet. If you had stopped hauling lumber to that siding when you had this one hundred thousand feet there, that item would be four hundred instead of seventeen hundred; isn't that right? A. No; it is not.

Q. Why not?

A. On all the lumber piled up at the siding [110] the freight was all paid. I had to pay seven dollars a thousand to get that hauled to Olympia and Tacoma. Then I had to pay four dollars a thousand to get it hauled to the mill site.

Q. I am talking about this item of \$1701, which is based on four dollars a thousand for hauling 425 thousand feet. I say, if, instead of hauling that other 325 thousand feet, after you claim you knew that the balance would not be taken, you would

(Testimony of John W. Feak.)

have saved that four dollars, that particular four dollars?

A. I would have saved the four dollars not only on that but on the rest of the lumber that I ordered to fill Rothstein's order.

Q. And if you had stopped these mills from cutting, if they were cutting especially for this order, at that time, you wouldn't have wound up with, as you claim, 425 thousand feet?

A. I would have wound up with more because I had the order placed and I had to take the lumber.

Q. Well, now, so far as that part is concerned, we have been over that this morning. Your arrangements with these mills was such that you were taking lumber from them all the time.

A. No. Only when I had orders. This was a special order and had to be especially cut and I distributed more [111] than thirty cars.

Q. You have answered my question.

Mr. Thompson: I think he should be allowed to answer.

Q. (By Mr. Reinhardt): You were in a position though to tell these mills to stop cutting at any time, were you not?

A. No, I wasn't. Certainly not. I wish I had been.

Q. You were in a position to tell them what to cut.

A. I had already told them what to cut. I gave them firm orders and they held me to it.

(Testimony of John W. Feak.)

Q. They held you to it?

A. They didn't have to; I performed to the agreement.

Q. But you didn't have to.

A. Yes, I had to. Certainly I had to. I had agreed to it.

Q. Now, according to this tabulation of yours, your first sale was at a price around thirty-three dollars a thousand. That is this sale of June 9th?

A. Yes; that is true.

Q. That was a very low price by comparison with the price that had prevailed?

A. That was the best price that I could get.

Mr. Reinhardt: If the witness can be instructed to [112] answer the question.

A. (Continuing): And it was not——

Q. (By Mr. Reinhardt): The fact is, on June 20th, the sale you made was at forty dollars a thousand?

A. The price I received I set forth there.

Q. Yes. And a majority of these other sales were at forty dollars a thousand or in that neighborhood; is that right?

A. I believe so. Except for those taken by Bucoda which had been hauled over there.

Mr. Reinhardt: No further questions, your Honor.

(Testimony of John W. Feak.)

Redirect Examination

By Mr. Thompson:

Q. About this \$1710, or \$1701, item, Mr. Feak, state what transportation that covered.

A. That covered the extra transportation.

Q. Yes?

A. To Olympia and Bucoda to where I had to take it. You couldn't leave it in the mill yard. I had to take it some place, so I took it to the remilling plants where I could sell when there was a demand again, or if I could find some buyer who would buy it in the remilled condition. I took it to the remilling plant instead of the side track.

Q. That \$1701, did any of that reflect transportation [113] from the mills to Rochester after you were informed that no further shipments would be taken? A. No.

Q. On or about March 8th at the time you made this second agreement, state whether or not any of these supply mills were in operation and, if so, which ones.

A. None were in operation for me. Mr. James' mill was cutting railroad orders. The only orders he could get.

Q. What about the rest of them?

A. They were all shut down for lack of buyers.

Q. Had you placed any orders with them previous to that time for any lumber whatsoever?

A. No; not on this order.

Q. And——

(Testimony of John W. Feak.)

A. I didn't have this order until March 8th.

Q. After you got the order from Mr. Rothstein, you placed the order for the supply mills?

A. I went around to Mr. Rothstein. These fellows agreed to start up if I could get the orders. When I got the orders I went around and gave the orders. I divided among the orders for thirty cars and not twenty cars because Mr. Rothstein wanted more.

Q. Did you have any other customers for that type of lumber at that time? [114]

A. I did not. This was a special order.

Mr. Thompson: That is all.

Recross-Examination

By Mr. Reinhardt:

Q. Did I understand you to say that all these mills were shut down in March, 1947?

A. My recollection is that they were.

Mr. Thompson: He said with the exception of James.

A. (Continuing): The little mill market had collapsed.

Q. (By Mr. Reinhardt): I beg your pardon?

A. The little mill market had collapsed.

Q. All right. But it is your testimony that all these mills, except James——

A. My recollection is that that is the fact.

Mr. Reinhardt: That is all.

Mr. Thompson: That is all, Mr. Feak.

(Whereupon, the witness was excused.) [115]

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a true and correct transcript of matters therein set forth.

/s/ EARL V. HALVORSON. [116]

FRANK D. BARR

called as a witness for and on behalf of the Defendant, upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. State your name. A. Frank D. Barr.

Q. What is your business?

A. Manager of the Bucoda Planing Mill.

Q. And how long have you had that position?

A. Since October, 1946.

Q. Previous to that what had been your business?
A. Buying lumber.

Q. For how many years? A. Since 1939.

* * *

Q. Were you familiar with the market price of this rough lumber, one, two, three and four inch widths in June, 1947?

A. To a certain extent, yes.

Q. You had some offers made on that, did you?

A. Yes, sir.

Q. What would you say was the market price of one and better and two and better at that time

(Testimony of Frank D. Barr.)

in that area, the area of Rochester, and at your plant?

A. It was pretty low. It started declining in the middle of the summer.

Q. May I present this document to refresh your recollection. You can't testify from it, of course. Can you now testify after refreshing your recollection?

A. Well, according to this we were paying twenty-eight dollars for one and twenty-three for two. [6*]

Q. Now——

Mr. Reinhardt: I object to that.

Mr. Thompson: That is probably correct.

The Witness: Excuse me.

Q. (By Mr. Thompson): Do you have any independent recollection?

A. Well, we buy from a good many mills. Some have longer lengths than others and you pay more money. I would say that the average price in that particular period would range from twenty-five dollars (\$25.00) to thirty-five dollars (\$35.00), depending on the lumber.

Mr. Reinhardt: What period is that?

Mr. Thompson: I put it May and June, 1947.

A. (Continuing): I am talking about rough cants.

Q. (By Mr. Thompson): Yes.

A. As we buy them.

(Testimony of Frank D. Barr.)

Q. That is right. Random widths and thicknesses? A. Yes, sir. [7]

* * *

Cross-Examination

By Mr. Reinhardt:

* * *

Q. Does it ever occur—strike that. Now, you testified to the price of rough cants during—when was it—what was the period you covered?

Mr. Thompson: May and June.

A. Yes, sir.

Q. (By Mr. Reinhardt): What was the market price at that time for rough [12] boards?

Mr. Thompson: I object to that as immaterial. Oh, I guess you can test the credibility of the witness.

Mr. Reinhardt: This is not for the purpose of testing the credibility of the witness, your Honor. It is based on the premise that what was involved here was rough boards and rough woods lumber.

Mr. Thompson: It is not proper cross-examination then. It wasn't gone into in chief.

The Court: Objection overruled.

A. Rough boards, if brought in ready for this planer, would be cut at less than five dollars in the cants.

Q. What about rough dimension lumber?

A. The same, if it was ready for the planer.

Q. Now, what would you say as to the going

(Testimony of Frank D. Barr.)

value of rough boards in June—in May and June—of 1947? Can you give us a price or a price range?

A. Well, I would just add five dollars to what I gave you before.

A. Well, I would ask you to give us a price.

A. I would say it would range between thirty and forty dollars.

Q. And rough dimension? A. The same.

Q. When did you have occasion last to check those [13] prices? A. In 1947?

Q. Yes. A. Just now, a moment ago.

Q. When you say a moment ago, what check did you make a moment ago?

A. Well, the memoranda that he showed me.

Q. I see. But do you have any independent recollection on that?

A. Well, I have a general recollection. I know the price slumped in the middle of the summer and we quit buying.

Q. Now, if I told you that Crows' Price Reporter showed a price for the week ending May 15th for rough boards of number two and better of between forty-five and fifty-five dollars, and for number three and better between forty dollars and fifty dollars, would that affect your testimony?

A. Not necessarily; no.

Q. Well, now, what do you mean by that?

A. Well, Crow gets most of his data from mills such as our own. We establish the price and he

(Testimony of Frank D. Barr.)

prints it a week or two later.

Q. Then these figures came from your mill or some mill like yours? [14]

A. Certainly. He gathers his information from the industry.

Q. That is right. So that, if this shows that the price he got in that way was forty-five to fifty dollars for rough boards number two and better, and forty to fifty dollars rough boards number three and better, then your recollection is probably in error, isn't that right?

A. No; I wouldn't say so. He is covering the whole West Coast. I am talking about Bucoda, this particular area.

Q. The fact is though that this price is based on information that he obtained from you and from other mills like yours? A. That is right.

Q. And you are not suggesting that it is not published correctly in here?

A. No; I wouldn't say that.

Q. Now, if I told you that Crow's Reporter showed a price range during the week ending June 12th for number one rough green of thirty-seven dollars and fifty cents to forty-five dollars, with most sales at forty to forty-three dollars, would you say that was not accurate?

A. What size lumber was that?

The Court: Let's not spend too much time on this. Go ahead and let him see that one. [15]

Mr. Reinhardt: I don't want to go through any more, your Honor.

(Testimony of Frank D. Barr.)

A. I would say he is correct for specified lengths. We were buying random lengths and talking about random lengths, which would be considerably less than specified lengths.

Q. Now, in your testimony, you said that—talking about this custom of reinspecting, you said that—that is generally agreed upon by the parties in advance?

A. No; it is accepted by the industry as the procedure to be followed unless some special agreement is entered into in advance.

Q. I see. Now, do you have any recollection about the prices of this kind of lumber that we have been talking about during the period of April—during the month of April?

Mr. Thompson: I object to that unless counsel specifies what kind of lumber. He talks about one kind and I talked about another.

The Court: That is almost self-evident that the witness can't remember but if you want him to, ask whether he agrees with the——

Mr. Reinhardt: Well, I assume he would agree with the figures in Crow's Reporter.

The Witness: Not necessarily. [16]

The Court: Now, if you want to ask him what a particular item would be, if he agrees with that item, whatever it is, you may do that.

Q. (By Mr. Reinhardt): But whether lumber can be disposed of to a local buyer, certainly these

(Testimony of Frank D. Barr.)

quotations indicate that it could be disposed of on the West Coast at the prices in these specified lengths? A. Yes, sir.

Q. And that is true of all the other information contained in here? A. It is close.

Mr. Reinhardt: That is all.

Redirect Examination

By Mr. Thompson:

Q. I asked you about rough green fir, random size and length. Counsel asked about mill run boards and small timbers and showed that the type of lumber he was talking about was five to ten dollars less per thousand than the type I was talking about. What is the reason for that, if you know?

A. I didn't quite get your point. In other words, you want to know why one inch and two inch woods lumber is more than cants?

Q. Why does lumber, mill run, three or better, sell [17] for more than random size and length rough and for remilling?

Mr. Reinhardt: The witness didn't so testify.

The Court: He is asking him now.

Mr. Reinhardt: Then I submit that he should not be led.

The Court: Proceed.

A. Why is number three and better, one and two inch cut, more than two and better rough green cants?

Q. (By Mr. Thompson): Counsel asked you a

(Testimony of Frank D. Barr.)

question based on Crow's Digest on the price of mill run, dimension boards. As I recall it.

A. Yes.

Q. And you said it had a price in excess, five dollars or more——

A. Of cants?

Q. Yes.

A. Yes, sir; because you have so much less labor in getting them ready for market. You don't have——

Q. Your testimony as to value was as to cants; is that right?

A. Yes, sir.

Mr. Thompson: That is all. [18]

Recross-Examination

By Mr. Reinhardt:

Q. Now, what is the difference between cants and dimension lumber, or rough boards?

A. Well, a cant is a four inch or thicker plank or timber which can be resawn to make boards to dimension.

Q. Getting under four inches is not a cant; is that right?

A. We don't call it a cant.

Q. So that one and two inch lumber would not be a cant?

A. That is correct.

Q. And just so that we can identify what we are talking about in Crow's Digest, taking Crow's Reporter for the week ending May 15th, what are the prices for rough boards and dimension lumber; that is one and two inch lumber?

Mr. Thompson: I object to that as not the best evidence. That document is in evidence.

(Testimony of Frank D. Barr.)

The Court: Objection sustained. The document is in evidence and you may read from it if you wish.

Mr. Reinhardt: No further questions.

Mr. Thompson: That is all, Mr. Barr.

(Whereupon, the witness was excused.) [19]

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a true and correct transcript of matters therein set forth.

/s/ EARL V. HALVORSON. [20]

PLAINTIFF'S EXHIBIT No. 8

J. W. Feak Mercantile Co.

Olympia, Washington

June 3, 1947.

Reinhardt & Schwab,
Portland, Oregon.

Gentlemen:

In response to your letter of May 15th, please be advised that it is your client who breached our agreement of March 4th, and not myself. In accordance with that agreement I made expensive preparations to ship the lumber as agreed and loaded three carloads the first two of which he received as agreed. and loaded three carloads the first two of which he

received as agreed. His refusal to accept the third car and subsequent cars violated the terms of our understanding and caused us substantial loss, as it became necessary to re-handle at great expense the many cars which were hauled and piled at the sidetrack for loading. Not only this, but I was put to additional expense in cutting this lumber to his specifications.

The premise upon which your client refused the 3rd car was that it was 4" thick. Your order to me included 4" lumber. Endeavoring to comply with his changing mind I began the manufacture of 1" and 2" lumber, and when a number of carloads were at the sidetrack ready for loading, I called Mr. Powers and asked him to check with Mr. Rothstein to be sure he hadn't changed his mind again. Mr. Powers stated Mr. Rothstein wouldn't take the 1" and 2" lumber either.

There is no point in reviewing the merits of your client's former claim since it was resolved by our agreement of March 4th, but since you make various statements concerning it, I will present to you the facts to keep the record straight.

The lumber shipped you conformed to invoice descriptions and the prices charged were not above ceiling prices. The only O. P. A. violation which could have occurred in the entire matter was in the nature of your client's offer to purchase from me. It was not until price decline of the lumber market that your client's conscience began to give him trouble. This assurance that there was not

violation of O.P.A. regulations with respect to the lumber I shipped him should relieve him of the apprehension that he was involved in breaking the law.

I have stood and still stand ready to fill his order of March 4th, despite the vacillating and changing moods of your client.

Your client forfeited any rightful claim against me whatsoever when he breached our agreement of March 4th, and the only balance between us is reimbursement to me for the loss and damage he caused me by reason of that breach of agreement.

Yours very truly,

J. W. FEAKE MERCANTILE
CO.,

By /s/ JOHN W. FEAKE.

JWF/M

[Admitted]: Oct. 19, 1949.

DEFENDANT'S EXHIBIT A-3

Exhibit A

March 4, 1947.

James Arthur Powers, Esq.,
Corbett Building,
Portland, Oregon.

Dear Jim:

This will confirm our conversation of this morning from which I understand that Mr. Feak has agreed to deliver to Mr. Rothstein for Prudential Lumber

Corporation in not less than thirty days from today twenty (20) cars of fir or pine lumber mill run of the same type as heretofore delivered to Prudential Lumber Corporation, random length and width but uniform thickness in either 1" or 2" thicknesses, cars to be loaded uniformly so that all the lumber in each car will be of the same thickness. The lumber is to be unfinished and is to be billed to Prudential at the rate of \$44.00 per thousand, on cars.

Mr. Rothstein advises me that he desires these cars delivered to the Carlson Planing Mill at Vancouver, Washington.

I am glad it was possible to dispose of this matter in this way.

Thanking you for your cooperation, I am,

Sincerely,

REINHARDT & SCHWAB,

By

Justin N. Reinhardt.

cc: J. W. Feak,
c/o J. W. Feak Mercantile Co.,
Roy, Washington.

Prudential Lumber Corp.
c/o Portland Columbia Lbr. Co.,
Cascade Bldg.,
Portland, Oreg.

JNR :p

Exhibit C

March 8, 1947.

Mr. James Arthur Powers,
Attorney at Law,
Corbett Building,
Portland, Oregon.

Dear Jim:

I discussed your letter of March 7th with Mr. Rothstein, and he advises me that he will be willing to accept 1 inch, 2 inch, 3 inch, or 4 inch lumber, so long as each car consists entirely of one thickness only.

All cars of 1 inch or 2 inch lumber are to be shipped to the Carlson Mill in Vancouver, Washington, as stated in my letter of March 4th. Shipping instructions for 3 inch and 4 inch cars will be furnished by Mr. Rothstein as the cars become ready for delivery.

With this letter it seems to me the parties have reached a final agreement. I hope you concur.

Thanks for your cooperation.

Sincerely,

REINHARDT & SCHWAB,

By JUSTIN N. REINHARDT.

cc Mr. J. W. Feak
E. Milton Rothstein

JNR/MM

Exhibit B

March 7, 1947.

Mr. Justin N. Reinhardt,
Attorney at Law,
Corbett Building,
Portland 4, Oregon.

Dear Justin:

I returned to the office from a siege of intestinal flu, and find your letter of March 4th concerning the Feak-Prudential matter. We agree in principle, namely, that Mr. Feak has stated that he would furnish 20 cars of rough lumber loaded on the cars, at \$44.00 per thousand, to the Prudential, and that the cars will be loaded in uniform thickness, random length and random width.

However, as to the 30 day period in which these cars must be furnished, Mr. Feak did not state to me that he could make delivery within the time specified by you, and therefore I think, as to the time in which these cars are to be delivered, the matter should be worked out directly between Mr. Feak and Mr. Rothstein. I am very much concerned about the time limit, because Mr. Feak, in my conversation with him a few evenings ago (I have not had a chance to talk to him since), stated to me that he would load and deliver to the Prudential the 1" and 2" as fast as he gets it from the mills. However, he pointed out that deliveries would not be as fast this way as they would be if the cars were loaded with mixed sizes. This is one of the

details I was concerned with when it was mentioned that the details could be worked out between us.

In this matter I have occupied more or less the position of arbitrator, and it was at my urging that Mr. Feak said he would deliver the 20 cars. Now I am beginning to feel very much like the individual who stepped into a domestic argument, trying to harmonize the differences in a matrimonial dispute, only to end up by getting socked from both directions. It is for this reason that I am suggesting that Mr. Rothstein and Mr. Feak work out the details of this matter directly. I know very little about the lumber business, but I do know in my limited experience that it is not an easy thing to get cars for a new operation. Mr. Feak will have to make arrangements to get box cars at the siding at Rochester, Washington. Now he may or may not be able to get those cars upon fairly short notice. It is my understanding that there is a car shortage, and I think Mr. Feak probably had this factor in mind also when he stated to me that he would make delivery of the cars to Prudential as rapidly as possible, but he certainly did not state to me that he would undertake to deliver them within 30 days.

Before stepping out of this situation, which I shall do with this letter, I want to pass on to your client a suggestion made by Mr. Feak in my last conversation with him, which was to the effect that the deliveries could be speeded up a good bit if unmixed cars of wider lumber, as well as 1" and 2", could be loaded; that is to say, as I understand it, a car of all 3", or a car of all 4", random widths and lengths.

The reason for this, I believe, is that Mr. Feak takes from the mills the mill run as it is cut. The capacity of the mills probably would be great enough to cut 20 cars in a period of 30 days of mill run, but the 1" and 2" would only be a portion thereof, and I am not at all sure that it would be physically possible for Mr. Feak to load out 20 cars within a period of 30 days. In any event he must speak for himself on this subject. I do recall that in his conversation with me he stated that any arrangement that was made he wanted to live up to one hundred per cent, as it was his desire to operate on a basis of full confidence with Mr. Rothstein, and that he did not want to enter into an agreement which he might not be able to fulfill. It is that remark, and similar ones, that makes me overly anxious here to make it clear that Mr. Feak did not tell me that he could deliver the cars specified within a period of 30 days. The parties are so close to an agreement here that I dislike to see it fall through by reason of some physical impossibility, and I think that by dealing directly, Mr. Rothstein and Mr. Feak could have an understanding on a satisfactory basis; in short, a meeting of the minds. Mr. Feak can usually be reached at Olympia 6549.

Yours very truly,

JIM.

James Arthur Powers.

JP:Be

cc to Mr. J. W. Feak

EXHIBIT D

March 11, 1947.

Mr. James Arthur Powers,
Corbett Bldg.,
Portland, Oregon.

Dear Jim:

I hereby confirm Mr. Rothstein's order for 20 cars of rough lumber at \$44.00 per thousand f.o.b. cars. Payment to be made through the U. S. National Bank of Portland, Portland, Oregon, upon presentation of invoices and bills of lading.

Lumber to be loaded one thickness only per car shipment in 1", 2", 3" and 4" unspecified widths and lengths. Invoices will show in detail various sizes in each shipment. One and two inch lumber to be shipped to Carlson Mill, Vancouver, Washington, for account of Rothstein and 3" and 4" lumber to be shipped as directed by Rothstein when notified.

Please handle this matter for me the rest of the way if anything remains to be done except deliver the lumber and that I will do.

Cars will be ordered at once and loading will commence at an early date.

Very truly yours,

/s/ J. W. FEAK.

[Admitted]: Oct. 18, 1949.

UNNUMBERED TABULATIONS USED DURING TRIAL OF CAUSE

Olympia Harbor Lbr. Co.
Sales To:—

1947	Footage	Received Payment	Loss Incurred by Diversion
June 9.....	232,078	\$ 7,677.59	
June 20.....	13,849	553.96 Less 2%	
June 20.....	5,935	237.40 Less 2%	
June 30.....	3,136	125.44 Less 2%	
June 30.....	24,361	964.10 Less 2%	
July 9.....	4,256	170.24 Less 2%	
July 9.....	384	14.81 Less 2%	
July 9.....	10,752	416.92 Less 2%	
July 21.....	17,771	710.84 Less 2%	
Aug. 27.....	4,629	21.76 Less 2%	\$11,476.20
Aug. 5.....	13,920	542.88 Less 2%	7,677.59
Aug. 5.....	1,184	40.26 Less 2%	\$ 3,798.61 Less 2% = \$ 75.97
July 31.....	10,341	413.64) Less 2%	
Aug. 5.....	15,104	583.14) Less 2%	
Aug. 5.....	3,210	73.17) Less 2%	1,069.95 Less 2% = 21.40
Totals	360,910	\$12,546.15	

360,910' @ \$44.00 per M. would have brought \$15,880.04

Actually brought 12,546.15 \$3,333.89

Loss in cost of hauling 425,251' @ \$4.00 per M. 1,701.00

Bucoda Lumber:—

64,341 @ \$44.00 per M\$2,831.00

Actually brought \$32.50 per M. 2,091.08 739.92

Loss incurred\$5,872.18

COMPUTATION OF DAMAGES CLAIMED BY PLAINTIFF

The total OPA ceiling prices billed by Feak amount to \$29,024.00. This figure it is claimed by plaintiff should have been \$26,095.63, based upon the following computation.

Lumber Received			
Grade	Quantity	OPA Ceiling Price	Total Price
Select	39,590	\$45.50	\$1,801.34
No. 1	210,538	40.00	8,421.52
No. 2	155,303	38.50	5,979.16
No. 3	172,478	32.50	5,605.53
No. 4	35,085	20.50	719.24
Hemlock	101,967	35.00	3,568.84
			\$26,095.63

This results in a basic claimed overcharge of\$2,928.37
to which should be added the following claims:

\$1 per thousand for the difference between the ceiling
price of rough lumber and finished lumber based on
total shipment of 723,000 ft. 723.00

Freight differential on hemlock at \$3.50 a thousand
on 101,967 ft. 355.00

Price differential between hemlock and fir \$2 a thousand 203.60

Shortage 8,000 feet at \$60 a thousand 480.00

Overcharge in the 5% item resulting from the over-
charge on ceiling prices, 5% of \$2,928.37 146.42

Total of overcharges and incidental losses
claimed by plaintiff\$4,836.39

Car	Billed	Actual	Surplus	Shortage
1.....	25,382	25,159		223
2.....	26,939	26,601		338
3.....	31,204	29,626		1,578
4.....	30,269	30,426	157	
5.....	25,442	25,321		121
6.....	40,406	40,225		181
7.....	30,310	30,348	38	
8.....	28,867	26,869		1,998
9.....	24,713	24,651		62
10.....	24,525	24,320		205
11.....	24,606	24,517		89
12.....	33,128	33,689	561	
13.....	27,488	27,518	30	
14.....	23,303	23,884	581	
15.....	24,933	24,700		233
16.....	23,911	25,343	1,432	
17.....	30,407	30,576	169	
18.....	32,408	31,773		635
19.....	25,780	20,841		4,939
20.....	31,467	31,397		70
21.....	32,593	32,999	406	
22.....	23,084	23,157	73	
23.....	31,337	28,808		2,529
24.....	26,739	26,739	.....	.....
25.....	23,780	25,420	1,640	
26.....	20,529	20,376		153
	723,550	715,283	5,087	13,354
Total Billed	723,550	Total Shortage	13,354	
Total Shipped	715,283	Total Surplus	5,087	
Difference.....	8,267	Difference.....	8,267	

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO
RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as amended, of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) of the Federal Rules of Civil Procedure, as amended, I am transmitting herewith as the Record on Appeal in the above-entitled cause, pursuant to Plaintiff-Appellant's Designation of the Contents of the Record on Appeal, filed herein, such original pleadings on file and of record in said cause in my office at Tacoma, Washington, as requested by the aforesaid Designation, as set forth below:

1. Complaint (1).
2. Amended Complaint (5).
3. Answer to Amended Complaint of Plaintiff and Cross-Complaint of Defendant (6).
4. Answer to Cross-Complaint (10).
5. Pre-trial Order (with exhibits attached) (17).
6. Verdict (21).
7. Judgment (26).
8. Plaintiff's Motion for New Trial (22).
9. Transcript of Court's Oral Opinion (31).

10. Order Overruling Motion for New Trial (32).

11. Order Approving Supersedeas and Cost Bond (33).

12. Supersedeas and Cost Bond on Appeal (34).

13. Statement of Points to Be Relied Upon (36).

14. Petition for Extension of Time for Docketing Record on Appeal (37).

15. Order Extending Time to Docket Appeal Record (38).

16. Stipulation for Transmittal of Portions of Original Record and Original Exhibits (39).

17. Order for Transmittal of Portions of Original Record and Original Exhibits to Court of Appeals (40).

18. Plaintiff-Appellant's Designation of Record on Appeal (41).

19. Reporter's Transcript of Testimony of John W. Feak and Frank D. Barr (42).

I do further certify that as part of the Record on Appeal I am transmitting herewith, pursuant to Order of Court, the following original exhibits, offered in evidence in the trial of the above-entitled cause, to wit: Plaintiff's Exhibits numbered 1 to 10, inclusive, and Defendant's Exhibits numbered A-1 to A-7, inclusive, and that the aforesaid original

pleadings and papers and exhibits constitute the Record on Appeal from the Judgment of the said District Court, filed and entered on the civil docket of said cause on October 31, 1949.

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 10th day of April, 1950.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 12521. United States Court of Appeals for the Ninth Circuit. Portland-Columbia Lumber Company, a corporation, Appellant, vs. J. W. Feak, doing business as J. W. Feak Mercantile Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed April 14, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12521

PORTLAND-COLUMBIA LUMBER COMPANY,
a Corporation,

Appellant,

vs.

J. W. FEAKE, dba J. W. FEAKE MERCANTILE
COMPANY,

Respondent.

PETITION AND ORDER
RE EXHIBITS

The Petition of Portland-Columbia Lumber Company, appellant, by its attorney, Justin N. Reinhardt, respectfully shows to the Court and alleges:

Appellant's designation of portion of record to be printed on appeal herein lists as item 16 thirteen issues of "Crow's Price Reporter," each of which is a printed pamphlet consisting of about ten pages. The expense of reproducing this large exhibit in the record on appeal herein would be prohibitive. Petitioner, therefore, respectfully prays the Court for an order that item 16 of appellant's Designation of Portion of Record to be Printed on Appeal

need not be reproduced but will be considered by the Court in its original form.

Respectfully submitted,

PORTLAND-COLUMBIA
LUMBER COMPANY,

By /s/ JUSTIN N. REINHARDT,
Its Attorney.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ HOMER T. BONE,

/s/ WM. E. ORR,

United States Circuit Judges.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PORTION
OF RECORD TO BE PRINTED ON AP-
PEAL

1. Pre-trial Order.
2. Verdict.
3. Judgment.
4. Plaintiff's Motion for New Trial.
5. Transcript of Court's Oral Opinion.
6. Order Overruling Motion for New Trial.
7. Order Approving Supersedeas and Cost Bond.
- 7a. Notice of Appeal.

8. Supersedeas and Cost Bond on Appeal.
9. Statement of Points to Be Relied Upon.
10. Petition for Extension of Time for Docketing Record on Appeal.
11. Order Extending Time to Docket Appeal Record.
12. Stipulation for Transmittal of Portions of Original Record and Original Exhibits.
13. Order for Transmittal of Portions of Original Record and Original Exhibits to Court of Appeals.
14. Plaintiff-Appellant's Designation of Record on Appeal.
15. Appellant's Statement of Points to Be Relied Upon, filed with this Court.
16. Crow's Price Reporter, plaintiff's Exhibit "5" and defendant's Exhibit "A-4," consisting of issues dated March 6th, March 20th, April 3rd, May 1st, May 15th, May 29th, June 12th, June 26th, July 17th, July 31st, August 14th, August 28th and September 11th, only the following portions of which ought to be printed:
 - (a) The "Note" which appears in identical form on the inside cover of said issues.
 - (b) The tabulation entitled "Rough Green Stock Produced By Small Fir Mills Not Equipped to Surface Lumber," which appears on the upper portion of Page 5 of each issue except the June 26th issue and on Pages 4 and 5 of that issue.

17. Testimony of Frank D. Barr, Page 3, lines 1 to 15; Page 6, line 10 to Page 7, line 19; Page 12, line 19 to Page 19, line 24.

18. Testimony of John W. Feak, Page 6, line 22 to Page 7, line 7; Page 11, line 2 to Page 12, line 15; Page 19, line 2 to line 13; Page 21, line 7 to line 16; Page 27, line 11 to Page 30, line 19; Page 31, line 25 to Page 44, line 11; Page 45, complete; Page 49, line 3 to Page 50, line 3; Page 74, line 2 to Page 75, line 4; Page 76, line 7 to Page 86, line 11; Page 89, line 23 to Page 99, line 6; Page 103, line 4 to Page 109, line 8; Page 110, line 6 to Page 115, line 20.

19. Plaintiff's Exhibit "8."

20. Defendant's Exhibit "A-3."

21. Unnumbered exhibit identified at Pages 44 and 45 of testimony of witness John W. Feak.

22. It is requested that in printing this record on appeal there be omitted therefrom all formal matters which it is permissible under the rules of this Court to omit, such as headings, verifications, certificates, etc.

23. Clerk's Certificate.

Respectfully submitted,

/s/ JUSTIN N. REINHARDT,
Attorney for Appellant.

Service accepted.

[Endorsed]: Filed April 29, 1950.

United States
COURT OF APPEALS
for the Ninth Circuit

PORTLAND-COLUMBIA LUMBER CO.,
a Corporation,

Appellant,

v.

J. W. FEAKE, d/b/a J. W. FEAKE MERCAN-
TILE COMPANY,

Appellee.

BRIEF FOR APPELLANT

Appeal from the District Court of the United States for
the Western District of Washington, Southern Division.

FILED

SEP 20 1950

JUSTIN N. REINHARDT,
Portland, Oregon,
Attorney for Appellant.

PAUL P. O'BRIEN, CLERK

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United States
COURT OF APPEALS
for the Ninth Circuit

PORTLAND-COLUMBIA LUMBER CO.,
a Corporation,

Appellant,

v.

J. W. FEAKE, d/b/a J. W. FEAKE MERCAN-
TILE COMPANY,

Appellee.

BRIEF FOR APPELLANT

Appeal from the District Court of the United States for
the Western District of Washington, Southern Division.

STATEMENT OF JURISDICTION

This is an appeal from a final judgment (R. 37) of
the United States District Court for the Western District
of Washington, Southern Division, entered on a verdict

(R. 36) dismissing the complaint and granting damages on appellee's counterclaim.

The District Court had jurisdiction under the provision of 28 U.S.C.A., Sec. 1332 (a) (1).

This Court has jurisdiction to review by appeal the judgment of the District Court under the provision of 28 U.S.C.A., Sec. 1291.

STATEMENT OF CASE

Appellant brought this action for breach of a contract to sell lumber (R. 8). Appellee counterclaimed, alleging failure by the appellant to accept all but two of twenty carloads of lumber which were to have been sold by appellee to appellant at a flat rate of \$44.00 per thousand board feet, loaded on cars (R. 6). The agreement, which is the subject matter of the counterclaim represented an attempt to settle certain differences between the parties under the original contract (R. 10). A trial was had under the pre-trial order setting forth the issues of law and fact (R. 2 to 19). The jury returned a verdict (R. 36) in favor of appellee for \$5872.18, the full amount of the counterclaim (R. 12, 25). Judgment was entered on the verdict (R. 37).

Appellant moved for an order setting aside the verdict and for a new trial under rule 59 (a) of the Federal Rules of Civil Procedure on the grounds that the verdict was demonstrably contrary to the Court's instructions; that the verdict was demonstrably contrary to the undisputed evidence; that the damages awarded were

grossly excessive; and that the verdict was so excessive and it disclosed prejudice or passion on the part of the jury (R. 38-39). This motion was denied (R. 44) and appellant took this appeal.

STATEMENT OF FACTS

The compromise agreement which was entered into in settlement of a prior controversy between the parties (R. 62, 63, 79, 87 and 88) is evidenced by the letter from appellee to Powers (R. 123) and involved the shipment of twenty carloads of rough green fir or pine of random lengths and widths but of uniform thickness of one, two, three and four inches per carload. The one and two-inch lumber was to be shipped to a designated point and the three and four-inch lumber was to be shipped as directed by appellant's president.

The letter to Powers was written on March 11, 1947. At that time Crow's Price Reporter, which was represented by appellee to be "used throughout the lumber industry as an authority respecting prices and conditions" having a circulation "throughout the full length of the Pacific Northwest . . ." (R. 77), showed that the price of \$44.00 per thousand was lower than the then prevailing market.

According to appellee's testimony the appellant refused to accept delivery between the 20th and 30th of March (R. 79). At that time, according to Crow's Price Reporter, one-inch "rough boards" sold at prices in excess of \$45.00 per thousand; two and three-inch "rough

dimension" lumber sold at prices in excess of \$45.00 per thousand, with most sales being made at \$55.00 per thousand.

Had appellee performed under the compromise agreement substantially all of the twenty cars would have been delivered within approximately thirty days of March 11, the date of the agreement (R. 100). This means that substantially all of the lumber would have been available by April 11 (R. 100).

According to Crow's Digest at all times prior to May 1st, one-inch "rough boards" sold at prices in excess of \$45.00 per thousand. At all times prior to April 3rd two and three-inch "rough dimension" lumber sold at prices in excess of \$45.00 per thousand with most sales made at \$50.00 per thousand. And between April 3rd and May 1st most sales of two and three-inch "rough dimension" lumber were made at more than \$45.00 per thousand (Exs. 5 and A-4, R. 132).

It is therefore clear that for a period of at least six weeks following the repudiation, an available market existed throughout the Northwest at prices in excess of the contract price of \$44.00 per thousand (R. 101, 109-113). Had appellee discharged his obligation to mitigate damages, as the trial Court charged the jury, he would have sold the lumber at substantially more than he claimed to have realized from the resale. In fact he would have realized a profit.

Instead, however, appellee remained idle while he "watched the lumber market which had gone into a decline" (R. 72) and finally sold between June 9 and

August 5 what he claimed to be the lumber rejected by appellant (R. 72). Defendant testified he sold lumber without notice to the plaintiff and he claimed a loss of \$5,872.18 (R. 25, 124), which is reflected in the jury verdict (R. 36). The sales took place in small quantities (R. 25), part of the lumber being sold to Bucoda for \$32.50 per thousand and the rest to Olympia Harbor at \$40.00 per thousand (R. 25, 74-75). According to Crow's Digest, during this period at which the resales took place, this was the price at which "cants" (lumber four inches and over) sold on the market (R. 114). No evidence was offered to show what proportion of the lumber over the 100,000 feet on hand at the time of the breach (R. 72) was one, two, three or four-inch lumber. It is undisputed that the lumber to be delivered under the compromise agreement was not to be all cants (R. 123). It is therefore clear that appellee did not sell the lumber covered by the agreement or, if he did, then he did not sell it at the current rates prevailing in the market (see testimony of appellee's witness Barr 109-114). There is, therefore, no evidence on which the jury could have arrived at a verdict for the precise amount of appellee's claim.

STATUTE INVOLVED

The contract was to be performed in the State of Washington. The governing law is, therefore, that of the State of Washington. At the time of the breach, the Uniform Sales Act was in force in that State. Remington Revised Statutes, Section 5836-64. Section 64 of the Uniform Sales Act provides as follows:

“(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

“(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

“(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

“(4) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.”

STATEMENT OF POINTS TO BE RELIED UPON

1. That the verdict is demonstrably contrary to the Court's instructions.

2. That the verdict is contrary to the undisputed evidence.
3. That the damages awarded are grossly excessive.
4. That the verdict is so excessive that it discloses prejudice or passion on the part of the jury.

SUMMARY OF ARGUMENT

Appellant's argument in support of the points to be relied upon may be summarized as follows:

1. The jury disregarded the trial court's charge that appellee was under a duty to mitigate damages and that if there was an available market and if he could have sold the lumber for more than he claimed to have realized from the resale, his damages would have been limited to the difference between the contract price and the amount he could have realized from the sale, or the market price.

There is undisputed evidence of an existing market and the case is, therefore, governed by Sec. 64 (3) of the Uniform Sales Act, Remington Revised Statutes, Sec. 5836-64 (3) As a matter of law the jury could not have found that appellee was diligent and timely in the conduct of the resale.

2. Appellee tried to avoid the rule of Sec. 64 (3) and apply Sec. 64 (2) claiming the difference between the contract price and the resale price. He offered no proof why evidence of the resale price could be used to support his claim for damages. Evidence of resale is

pertinent only where: (1) There is affirmative evidence of the lack of an available market; and the burden of establishing this lack of market is upon the seller, or, (2) Where it is accompanied by evidence of good faith and timeliness in the conduct of the resale.

Here the existence of a market at the time of the breach was proved by Crow's Digest (Exs. 5, A-4, R. 78, 100-101) and by appellee's witness Bar (R. 112-113) and was acknowledged by appellee himself R. 100-101). And the value of that market during the six weeks period following the breach was higher than the contract price. Appellee offered no countervailing proof of good faith in connection with his resales, except his own unsupported assertion that he sold at the best prices he could get (R. 72, 97, 104). This is insufficient, at best (*Derami, Inc. v. John B. Cabot, Inc., et al.*, 273 App. Div. 717; 79 N.Y.S. 2d 664 (1948)), if it does not affirmatively establish that appellee conducted the resales in bad faith.

ARGUMENT

Point 1

The jury disregarded the trial court's charge that appellee was under a duty to mitigate damages. As a matter of law the jury could not find that appellee was diligent and timely in the conduct of the resale.

The case is controlled by Section 64 (3) of the Uniform Sales Act, Remington Revised Statutes, Section

5836-64 (3) which limits damages for non-acceptance of goods, where there is an available market, in the absence of special circumstances, to the difference between the contract price and the market price at the time when the goods ought to have been accepted.

Here, however, appellee attempted to measure his damages by the difference between the contract price and the amount realized on resales some two or three months after the breach (R. 25, 72). Crow's Price Reporter which was admitted by appellee to be "an authority respecting prices and conditions", "throughout the lumber industry", "having a general circulation", "throughout the full length of the Pacific Northwest" (R. 77), conclusively establishes the existence of a market at all times from the breach up to and including the time of the resales. And on cross examination appellee's witness Barr testified that the quotations shown in Crow's indicate that the lumber could have been disposed of on the West Coast at the quoted prices (R. 112-113). The market was clearly in existence and in fact for a period of about six weeks after the breach it was higher than the contract price of \$44.00 per thousand (Exs. 5 and A-4, R. 132). Accordingly, appellee could have sold the lumber during this period and realized a profit as a result of appellant's breach. It must therefore follow that appellant is entitled, at most, to nominal damages. Furthermore, Crow's shows that the only lumber which sold at prices alleged to have been received by appellee from the resale were cants (R. 114). Since appellee claims to have resold the one and two-inch lumber at these prices he therefore must not have

received the best prices obtainable as quoted in Crow's. As a matter of law therefore appellee was not diligent and the jury could only have awarded appellee his damages in disregard of the trial court's charge.

Hartman Pac. Co., Inc. v. Estee, 127 Wash. 151, 219 Pac. 867 (1923), on rehearing 131 Wash. 697, 229 P. 326 (1924), was an action for non-acceptance of two thousand cases of canned salmon tendered on Dec. 1, 1913. The seller immediately notified the buyer that he would sell the salmon and hold him liable for any loss sustained. The sales were made between April 19, 1920 and February 28, 1921 and judgment was for the difference between the contract price and the resale price. The Court, in reversing the judgment on the ground that the resales were not made within a reasonable time, remanded the case with instructions to enter judgment in favor of the seller for nominal damages only. The Court said:

"There seems to be no escape from the conclusion that by the exercise of reasonable diligence the respondent could have sold the salmon, within the next 3 or 4 months after December 1st, upon the market for a price of approximately \$2 per dozen, which was only 15 cents less than that at which respondent had contracted to sell it to the appellants. This it did not do, but sold it upon a further receding market beginning in the April following and continued to dispose of it in small lots during the next 9 or 10 months at continually receding prices. It is true the trial court found that the salmon was sold within a reasonable time, but this is not a finding of fact upon substantially disputed testimony. It is rather a conclusion from the facts about which there can be little dispute."

In *Washam v. Wood*, 177 Wash. 183, 31 Pac. 2d 508 (1934), the seller brought an action for non-acceptance of 20 tons of wheat at \$34.00 per ton. Instead of the seller reselling immediately to establish his loss or to prove the market value, the seller waited and then sold the wheat at a loss. The Court in reversing a judgment based upon the difference between the contract price and the resale price said:

“According to respondent’s own testimony, the market value of the wheat when it was threshed was \$34 per ton, the contract price. Therefore, there was no loss occasioned by the breach. Having notified the grain company of the time and it having failed to live up to its contract to take the wheat from the machine, respondent was free to sell it at once and could have thus realized the contract price. That he did not choose to take immediate advantage of the breach and resell the wheat was his own choice, and he cannot hold the grain company for the subsequent fall in the market price.”

See also *A. B. Fossesen & Co. v. Kennewick Supply and Storage Co.*, 144 Wash. 67, 256 Pac. 779 (1927); *Hess v. Seitzick, et al.*, 95 Wash. 393, 163 Pac. 941 (1917).

And in *Hughes v. Eastern Ry. & Lbr. Co.*, 93 Wash. 558, 161 Pac. 343 (1916), the Court said that where a market existed and no damage would result if he availed himself of the market, the seller was not entitled to damages for the breach:

“Where there is a market, it is the duty of the aggrieved party to practice diligence, to the end that the loss may be as ‘small as possible.’ And we

think this is the rule governing this case. The reasoning which sustains the rule is simple. It is that damages are allowed as compensation for actual monetary loss, and if the vendor can find a market equal or better than that provided in his contract, there is no loss to compensate."

In *Sheldon v. Argos Mercantile Corp.*, 194 App. Div. 472, 185 N. Y. Supp. 513 (1920), affirmed 233 N.Y. 585, 135 N.E. 928 (1922), the seller could have sold the goods at the time of the breach in Cuba, the place of delivery, at a price exceeding that which defendants agreed to pay. Instead of this plaintiff chose to speculate, and to that end shipped the sugar to France. A loss at sea of part of the sugar resulted in a loss of profits upon which the claim for damages was based. The Court said, at page 517:

"The judgment appealed from must be reversed. From the plaintiff's own testimony no damages were suffered. While there was a question of fact for the jury respecting a breach of the contract by the defendants, still the plaintiff absolutely failed to establish damages by any competent proof and under his own testimony the market value of the sugar at Havana, upon the date of the alleged breach, and for a long period of time thereafter, was at least equal to the contract price, and the sugar was thereafter sold in France by the plaintiff and his co-adventurer for \$2.40 per 100 over the price fixed in the contract with the defendant. Clearly the defendant cannot be called upon to respond in damages for the failure of plaintiff's speculations. . . ."

The case at bar is on all fours with *Chozo Yano, et al. v. Ledman, et al.*, 188 N. Y. Supp. 764 (N.Y.C. 1921), where the breach occurred on Dec. 4 at which time the

market price (of pongee) was \$19.55 per piece. The plaintiff did not dispose of the merchandise until Dec. 28 when the market had dropped to \$17.00 per piece. Between Dec. 4 and Dec. 28 the evidence showed that the market had been low. The plaintiff contended that the resale price was the best price obtainable at that time.

The jury rendered a verdict based upon the price realized on the resale of the merchandise. The trial judge in setting aside the jury verdict said:

“The measure of the plaintiff’s damages was the difference between the contract price and the market value of the merchandise at the time that the contract was breached, and if the plaintiff continued to correspond with the defendants between Dec. 4 and the 20th of Dec. by withholding the sale of said merchandise with the hopes that the defendants would cable to Japan, through their bank, a letter of credit for the amount of the contract, it was their own fault. The market on Dec. 4 was \$19.50, and if the merchandise were sold when the market was high, at the price then prevailing, the defendants would have been compelled to pay the difference between the agreed price and the market price, to-wit, 50 cents per piece, or about \$100.00. It was incumbent upon the plaintiff to use reasonable diligence in disposing of the merchandise so that it would be damaged as little as possible. (Citing cases.)

“We must bear in mind that by the retention of the merchandise by the plaintiffs after the breach occurred, to-wit, Dec. 4, 1920 to Dec. 28, when an opportunity prevailed on the 4th day of Dec. to dispose of said merchandise at a higher price than what was obtained when said merchandise was sold on the 28th day of Dec., the amount found

by the jury was in excess of the amount that the plaintiffs would be entitled to. The Court charged the jury that if they believed that the plaintiffs were entitled to recover, the damages would be the difference between the contract price and the market price at the time of the breach. The jury, in rendering their verdict in the sum as found by it, assessed the damages that plaintiffs had sustained at the market price that was obtainable on the 28th day of Dec. 1920, to-wit, the sum of \$17.00 per piece, and awarded the plaintiffs a verdict for \$1200.00.

“The jury disregarded the Court’s charge as to the measure of damages that the plaintiffs were entitled to and for this error in enhancing the amount of damages the motion of the defendants must be granted for the failure of the plaintiffs in not disposing of the merchandise at the market which was then prevailing on the 4th day of Dec., when the breach occurred. The defendants are therefore entitled to a new trial as a matter of right and not as a matter of favor, for the mistake of the jury, without costs, to which the plaintiffs may have an exception.”*

See also *Worcester Bleach & Dye Works v. Dlugasch*, 181 N. Y. Supp. 44, in which the Court set aside a verdict and ordered a new trial where a resale had been made without previous notice, for a price substantially below the market price, holding that in such a case the resale price was unfair as a matter of law.

Here the undisputed evidence is that there was an available market for the lumber at all times from the

*This was reversed in *Chozo Yano, et al. v. Ledman, et al.*, 192 N. Y. Supp. 647 (1922), on the ground that it was stipulated at the trial that the breach occurred not on Dec. 4 but on Dec. 20. Since the market price on that date was \$16.55 per piece the appellate court found that the verdict was not sufficiently excessive so as to warrant its being set aside. Nevertheless the law as stated by the trial judge is eminently correct and the case is still good authority despite its reversal which was based upon a stipulated fact ignored in the original opinion.

time of the breach, i.e., the latter part of March (R. 79) up to and including the period during which the resales took place, i.e., June 9th to August 5th. And for about six weeks from the time of breach, appellee could have sold the entire quantity of lumber at prices in excess of the contract price of \$44.00 per thousand (R. 77, 79, 101).*

The jury verdict was therefore contrary to the Court's charge on the appellee's duty to mitigate damages, and the trial court erred in not setting it aside.

Point 2

There is no evidence that appellee's alleged resales were timely or made in good faith and therefore no evidence to support the verdict and judgment for the difference between the contract price and the amount realized on resales.

If we assume, as the Court below did (R. 42), that the jury was free to disregard Crow's Price Reporter, the record would then be devoid of any evidence of market value at any time. Under these circumstances, the evidence as to the amount realized on the resales is insufficient to support the verdict without affirmative proof of good faith and timeliness in the conduct of the resales. No such evidence appears in the record, and there is

*There were received in evidence copies of Crow's Lumber Price Reporter (Exs. 5, A-4, R. 132), which show that at all times between March 20th and May 1st, one-inch "rough boards" sold at prices in excess of \$45.00 a thousand. At all times prior to April 3d, two-inch and three-inch "rough dimension" lumber sold at prices in excess of \$45.00 a thousand, with most sales being made at \$50.00 a thousand, and between April 3d and May 1st, most sales of two-inch and three-inch "rough dimension" lumber were made at more than \$45.00 per thousand.

therefore no competent evidence of the extent of appellee's loss.

In *Magnes v. Sioux City Nursery & Seed Co.*, 14 Colo. App. 219, 59 Pac. 879 (1900), the Court, in reversing a judgment in favor of a seller on the ground that in view of the evidence the difference between the contract price and the resale price was not a proper measure of damages, said:

"The result of a resale can never control the question of damages against the defaulting vendee, nor be given in evidence to that end, unless the vendor has satisfactorily proven that he exercised the right in good faith, and at such time, and in such manner, and by such methods, and under such circumstances as were best calculated to protect the rights of the defaulting vendee, and secure the best market price for the property."

In *Hess v. Seitzick, et al.*, 95 Wash. 393, 163 Pac. 941 (1917), the seller resold butter from about a month and a half to 3 months after its rejection by the purchaser. Some of the butter was sold for more than the contract price and some for less. A judgment based upon the difference between the contract price and the amount realized on resale was reversed and a new trial granted, the Court saying:

"The seller [in executory contracts of sale] is not bound to resell, in order to ascertain the value; he may either resell, or rely upon other evidence of value, at his option. If he does resell, he must, in order to have the result available as evidence of value, pursue, in substance, the same course as that required of a vendor who sells to enforce his lien; that is, he must sell in good faith, within a reason-

able time, after notice in the customary manner, and at the place of delivery, or, if there be no market there, then in the nearest and most available market."

In *Crawford v. Dahlenberg, et al.*, 221 Mo. App. 600, 283 S.W. 65 (1926), the wool was rejected on May 19th, and on May 29th, there being no market for the goods where they were to have been accepted, the plaintiff shipped the wool to the nearest available market, with instructions to sell at no less than the contract price. Being unable to obtain that price, the wool was finally sold on July 28th at eight cents less a pound than the contract price. The verdict for plaintiff was reversed, the Court holding as a matter of law that the plaintiff did not use due diligence in disposing of the wool, saying:

"The manner of sale is within the reasonable discretion of the seller; but it should be made in good faith and in the mode best calculated to produce a fair price for the goods, and, as the seller acts as agent of the original buyer, he is held to the same degree of care, judgment, and fidelity as an agent in possession of goods with instruction to sell to the best advantage. 35 Cyc. 523, 524.

" . . . For plaintiff to have insisted that his commission agent not sell the wool for less than 38 cents a pound under the circumstances was certainly not due diligence.

"Under the circumstances the sale was not fairly made, and plaintiff is entitled to recover (if anything) the difference between the sale price and the actual market value of the wool at Kansas City at the time of the breach of the contract." (Citing cases)

Obrecht v. Crawford, et al., 175 Md. 385, 2 Atl. (2d) 1, 119 A.L.R. 1129 (1938), was a seller's action for non-acceptance of perishable Argentine flour at the contract price of twenty-six dollars per ton. The seller resold immediately following the repudiation in England and sued to recover the contract price less the amount realized on resale. Affirming a verdict in this amount the Court undertook to state "the legal principles affecting the rights and remedies of a seller who is himself without fault against a buyer who wrongfully fails to accept the goods sold to him under a sales contract."

"Where the goods are of a perishable nature, the right of the seller to re-sell them is settled, Code, Art. 83, Sec. 81, but where he elects to resell, he must do so within a reasonable time and in such a manner as to secure the best obtainable price, 1 U.L.A. sec. 60 LV p. 314, and he is bound to exercise reasonable care and diligence to that end, Ibid, Code, Art. 83, Sec. 81, subsec. 5; 2nd Ed. Tiffany on Sales 350, 55 C.J. 1055 et seq.; *Kahn v. Carl Schoen Silk Corp.*, 147 Md. 516, 530, 128 A. 359, 44 A.L.R. 285; Williston on Sales, secs. 546, 547; 24 R.C.L. 114; 42 L.R.A. N.S. 682.

"Where there has been an actual resale the measure of damages is formally different, since there it is the difference between the lesser price realized at the resale and the contract price, if the resale was made in good faith, *Kahn v. Carl Schoen Silk Corp.*, supra, page 532, 128 A. 359. A sale in good faith is a 'fair sale . . . according to established business methods, with no attempt to take advantage of the vendee', *Ackerman v. Rubens*, 167 N.Y. 405, 60 N.E. 750, 751, 53 L.R.A. 867, 82 Am. St. Rep. 728, and the burden of proving that the sale was so made seems to be upon the seller, Williston on Sales, sec. 547."

In Williston on Sales, Revised Edition (1948), the author says:

“The market price may usually be proved by a resale of the goods at the proper time and place in a fair manner; but the price actually obtained at the resale is not conclusive.” (Sec. 582) See Annotations in 44 A.L.R. 215; 119 A.L.R. 1142.

“One important purpose of reselling the goods is to fix the measure of the buyer’s liability for failure to fulfill his obligation. In order that the sale should furnish an accurate test of the seller’s injury, and the buyer’s wrong it is necessary that the sale should be properly made. . . .” (Sec. 546)

“Unless the resale is made about the time when performance was due it will be of slight probative force, especially if the goods are of a kind which fluctuate rapidly in value, to show what the market price actually was at the only time legally important.” (Sec. 550a)

The Court’s opinion in the Obrecht case shows that the seller went to great lengths to sustain the burden of proof on this point. It refers to testimony “that the flour was shipped to England ‘endeavoring to sell it at the best price and even utilizing for this purpose previous contracts we had pending at a price considerably over the market price at the time of shipment’ and that because of the perishable nature of the goods it was deemed best to resell it ‘within a week’ after ‘the specified time’ and that part of the shipment was sold at fully 20% over the highest market price on the day of shipment.”

By contrast, the record in the case at bar is devoid of any evidence whatsoever that the resales were made

diligently and in the mode best calculated to produce a fair price for the goods other than appellee's bare assertion that he got the best price obtainable (R. 72, 97-98, 104).

His testimony was even weaker than that discussed in *Derami, Inc. v. John B. Cabot, et al.*, 273 App. Div. 717, 79 N.Y.S. (2d) 664 (1948). There the Court categorically rejected the resale price as a basis for measuring the plaintiff's recovery. That case was a seller's action for non-acceptance, on Dec. 16, 1946, of some 34,000 dozens of cans of tooth powder at \$1.05 per dozen cans. On Jan. 13, 1947, the seller notified the buyer of his intention to resell and to hold the buyer liable for any loss sustained therefrom. The merchandise was sold on Jan. 16 at ten cents per dozen cans. Thereafter obtaining a better offer, the seller paid the first purchaser \$2581.00 to be released from the sale and sold about three-fourths of the cans for sixty cents per dozen. The trial court, sitting without a jury, awarded damages based upon the difference between the contract price and the amount realized on the resale after deducting the \$2581.00 and other expenses. There was no proof offered to show whether a market existed at the time of the breach and if so what that price was. The only evidence offered was the testimony of plaintiff's president to the effect that plaintiff had tried to sell the merchandise to many firms and that the sixty cent price was the best obtainable.

In reversing the judgment and granting a new trial on the ground that there was a total lack of evidence

that the resale price represented the market value at the time and place of the breach, the Appellate Division said:

“The only relevance which any resale could have would be to furnish evidence of market value, in the event there was an available market for the goods, or, if there was no such market, then to aid in determining what was the loss directly and naturally resulting from the buyer’s breach of contract.

“ . . . there is no testimony in the case by anyone familiar with the business concerning whether there was an available market for the goods. If there was no such market, the price on resale could not be regarded as evidence of market value. . . .”

Another reason mentioned in the Derami case why the resale price cannot be accepted as representing the market value

“ . . . is that market value on Feb. 10, 1947, has not been shown to be evidence of what it was on the performance date of Dec. 16, 1946.

“In any event, a single sale of a portion of the goods, . . . on Feb. 10, 1947, cannot be regarded as proving that there was an available market for the goods at that time in the absence of any testimony to that effect. . . .”

The circumstances that plaintiff’s president testified that he previously offered to resell to other people failed, the Court said, to fill the hiatus in the proof since:

“ . . . there was nothing to show that those firms were the principal ones who would be interested in buying that type of tooth powder, nor does the conclusion follow of itself that there was no available market for the reason that these firms did not wish to buy.

“ . . . The object in view is to arrive at the realizable value of the goods at the time when the contract should have been performed, and to subtract that from the contract price in order to arrive at the damages. We cannot hold, in the absence of testimony by anyone familiar with this type of business, that such damage is established on the basis of this record without being informed on whether the sale represents either the market price in case of an available market for the goods, or that the resale was a fair test of the actual value in the absence of an available market. . . .

“A new trial must be had in order to determine whether there was a market value for this tooth powder on the date specified for completion of the performance of the contract, Dec. 16, 1946; and, if so, the amount thereof, or, if there was no market value on that date, then to determine in accordance with this opinion the loss directly and naturally resulting, in the ordinary course of events, from the defendant buyer's breach of contract. . . .”

And in *Frankel, et al. v. Foreman & Clark*, 33 Fed. 2d 83, 2 Cir. (1929), an action to recover damages for failure to accept and pay for certain coats sold by plaintiff to defendant, the only proof of loss offered was the amount realized on the resale of the coats about two and one-half months after their return by defendant. The verdict awarded damages based on the difference between that sum and the contract price. The Court reversed a judgment for plaintiff for the difference, saying per Hand, A. N. J.:

“ . . . The resale was only to ascertain the value at that time. But the testimony indicates that November 16th when the coats were returned, was the height of the season for this merchandise, and no attempt was made to sell it until after December

7th, when there was a low market. In such circumstances, a sale on the 1st of February could hardly be regarded as any evidence of the market value of the 360 coats at the time of the breach. There not only was no proof that the market value of the goods had not changed between the date of the breach and the time of the resale, but the testimony seems to indicate that it had. *The amount received at such a sale furnished no basis for computing damages.* Waumbeck Mfg. Co. v. Alfrandi, et al., 196 App. Div. 64, 187 N. Y. Supp. 439, Bonyng v. Carex Co. (Sup.) 188 N. Y. Sup. 751. It is true that what is a reasonable time within which to make a sale, in order to furnish an estimate of the market value is, within proper limits, a question for the jury (Hausman v. Buchman, 189 App. Div. 597, 179 N. Y. Sup. 26); but the testimony should at least not show that the market had fallen between the date of the breach and the time when the sale was made." (Italics ours)

It should be noted that in the case at bar the testimony did show that the market had fallen between the date of the breach and the time when the resales were made and that appellee was well aware of that change since he testified: "I watched the lumber market which had gone into a decline" (R. 72). Yet the record is totally devoid of evidence of any fact which could justify appellee in withholding the resale of this lumber for about two months while he "watched the lumber market which had gone into a decline" or of any fact which could justify a verdict fixing the amount of his recoverable loss by reference to resales so made.

In Waumbeck Mfg. Co. v. Alfandri, et al., 196 App. Div. 64, 187 N. Y. Supp. 439 (1921), the Court said:

“ . . . [A] resale a month thereafter is not evidence of the market or current price at the time the goods ought to have been accepted, without an allegation in the complaint that the market was the same or any reason assigned why the resale was not made forthwith at the time of the non-acceptance, or of what was the market value at the time.”

See also *Sonken-Golamba Corp., et al. v. Butler Iron & Steel Co.*, 119 Fed 2d 283, 8 Cir. (1941), Cert. den. 314 U.S. 683; *Haughey v. Belmont Quadrangle Drilling Corp.*, 284 N.Y. 136, 29 N.E. 2d 649, 130 A.L.R. 1331.

Thus, giving appellee the benefit of the doubt respecting his good faith, the best that can be said for the record is that it is without any evidence which would justify the jury in fixing the amount of appellee's loss at \$5872.18.

CONCLUSION

The verdict was therefore based upon an erroneous rule of damages in disregard of the Court's charge, or, if considered to be based upon a correct rule of damages, was not supported by any evidence. The judgment should be reduced to a nominal sum or a new trial ordered to establish the amount of appellee's recoverable loss.

Respectfully submitted,

JUSTIN N. REINHARDT,
Attorney for Appellant.

No. 12521

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

PORTLAND-COLUMBIA LUMBER CO.,
a corporation,

Appellant,

vs.

J. W. FEAK, d/b/a J. W. FEAK MERCANTILE
COMPANY,

Appellee.

BRIEF FOR APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

L. L. THOMPSON,
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STATEMENT OF FACTS

Deeming the statement of facts in appellant's brief to be incomplete and, in some of its conclusions at least inaccurate, appellee elects to make his own statement.

Through a series of letters (R. 117 to 123) appellee agreed to sell and appellant agreed to buy twenty carloads of rough unfinished green lumber at a price of

\$44.00 per thousand f.o.b. on the cars. The contract did not call for any particular grades but, as was stated in a letter written by counsel for appellant on March 8, 1947, appellee agreed "to accept 1-inch, 2-inch, 3-inch or 4-inch lumber so long as each car consists entirely of one thickness only." (R. 119.) It was also specifically agreed that the lumber might be of random or unspecified length and width (R. 120-123). It will thus be seen that there was no definite limitation placed upon appellee concerning the percentage of the cars which would be of any specified thickness. This was left largely to his discretion for the reason, as is shown in the letters, a quicker delivery of 4-inch lumber commonly known as cants could be procured than 1-, 2-, and 3-inch lumber (R. 122). Appellant first sought to obtain a binding delivery date of thirty days (R. 118) but appellee would not agree to this (R. 120). It may be admitted that it was contemplated that delivery would be made as soon as reasonably possible.

Appellee was not a manufacturer of lumber and did not own or operate any mills. The shipping point for the lumber which was to be furnished and which was the same area from which appellee had obtained other lumber for appellant, was Rochester, Washington. As soon as the contract was made appellee went to certain woods mills in this area and contracted for this lumber, and in many instances made payments in

advance so that the operators of these mills could finance their operations (R. 61). These so-called woods mills were in reality not sawmills in the generally accepted industrial sense but usually consisted of one power saw and a carriage which pushed the log into the saw, often with nothing but a roof over them. They had no planers or edgers and without such installation they could only cut 4-inch lumber (R. 60). To obviate this, in some instances, appellee financed the purchase of additional equipment for such woods mills (R. 67-68.)

Appellee shipped two carloads of 4-inch lumber, which was received and for which payment was made. He had two additional cars of 4-inch lumber at the railroad siding immediately ready for shipment and also about 5 cars of 1- and 2-inch lumber ready for shipment (R. 70). Sometime between March 20th and March 30th he called on Rothstein, the president of appellant, in Portland and asked shipping instructions concerning the 4-inch lumber which he had ready for shipment and which under the contract he was required to ship to such places as might be designated by Mr. Rothstein. He testified that Mr. Rothstein told him "he wouldn't take any one or two or three or four or anything else." (R. 70.) Thereupon appellee communicated by telephone with one Powers, a Portland attorney who had more or less acted as appellant's representative in

the matter (R. 70 and 116). Thereafter some general discussion was had between the parties, the exact nature of which is not revealed by this record. In any event, it does appear that the discussion continued until May 15, 1947, because there is in the record a letter dated June 3, 1947, from appellee to appellant's counsel, which letter refers to a letter dated May 15th from appellant's counsel, Mr. Reinhardt, to appellee (R. 115-116).

Thereupon appellant began to resell this lumber. The first sale of 232,078 feet was made on June 9th at a price of \$32.50 per thousand and the last sale on August 5th. As is correctly stated in appellant's brief (page 3) most of the lumber was sold at a price of \$40.00 per thousand.

Concerning the circumstances of the resale, appellee testified as follows: (R. 72).

“I watched the lumber market which had gone into a decline. I tried to sell this in both Tacoma and Olympia Harbor and I tried to find other orders where I could have it remilled and disposed of and I finally sold, months later, the lumber that I had transported to Tacoma. I had no place to leave it by the mill sites.”

He then testified that he finally sold the lumber to a concern in Bucoda and the Olympia Harbor Lumber Company, and that he expended the sum of \$1701.00 in extra hauling expense (R. 72-75).

Concerning the state of the lumber market at the time of the breach, he testified that "some mills were selling that same kind of lumber at the end of March and glad to get it at \$35.00" (R. 74).

Appellant introduced no evidence whatsoever concerning market prices either in this area or generally in the Pacific Northwest during this time. The only disinterested witness who testified concerning market conditions was the witness Barr who was manager of Bucoda Planing Mill and had been a lumber buyer in this area since 1939 (R. 107). Barr testified that in May and June the price for rough cants, which is green lumber with a thickness of four or more inches, was from \$25.00 to \$35.00, depending on the lumber (R. 108). On cross-examination he further stated that the price for 1, 2, and 3 rough boards or rough dimension would be \$5.00 more and would therefore range between \$30.00 and \$40.00 (R. 110).

When it is recollected that the lowest resale price obtained by appellee was \$32.50 and that he sold most of this lumber at a price of \$40.00, which was a price of \$15.00 over the lowest market price and of \$5.00 over the highest market price for cants and was the highest price for rough or dimension lumber, it seems clear that the witness established not only the price but the fact that appellee exercised due diligence and good faith in making the resale.

As we have noted, appellant introduced no evidence on this issue. His brief relies entirely upon the publication known as Crowe's Price Reporter, which we introduced in evidence. Appellant's brief picks from Crowe's Price Reporter certain statements as to sales made of one-inch rough boards and two- and three-inch rough dimension lumber which are in excess of the price fixed by the witness Barr. Hereafter we shall discuss Crowe's Price Reporter in greater detail, but it is sufficient to say that the witness Barr in his cross-examination showed clearly the lack of materiality to the issue here of the figures set forth in appellant's brief. In cross-examining Mr. Barr (R. 111) counsel called his attention to certain portions of the Price Reporter which it was asserted showed a price in excess of that fixed by the witness. In explaining this Mr. Barr said "I would say he is correct for specified lengths. We are buying random lengths and talking about random lengths, which would be considerably less than specified lengths" (R. 112).

This Price Reporter was issued about every two weeks and covered reported prices for the preceding two weeks. The issue of April 3rd which would cover the period from about or shortly before the date of the cancellation of the order up to April 3rd is interesting, showing a price range of \$38.00 to \$48.00 which was a substantial drop from the issue of March 20th which

showed a price range of from \$40.00 to \$50.00. This probably explains the reason for the repudiation of the contract by appellant in the latter part of March.

The same issue contains the following statement concerning general market conditions in the whole Pacific Northwest as is shown by the following paragraph:

April 3, 1947.

“The market on straight cars of green common has a very well defined leaning to weakness, as will be noted in comparing the low side of the prices here reported, as they have lost considerable ground during the past two weeks. Here again, we would like to mention that the further down the line you go in the way of service, that is the less the mill has to offer in the way of giving the buyer what he wants, the less they are having to take for their stock.”

We call particular attention to the statement here that the less the mill has to offer the less it will receive. Certainly appellee was in this position when this contract was breached.

The issue of May 1, 1947, which covers the last two weeks in April has this general observation:

May 1, 1947.

“The market for all softwoods are very definitely pointed to a weakness as is borne out by figures appearing in this issue of our Price Reporter. As was to be expected, the buyers have been

quick to take advantage of the first leverage that has been in their hands for many months. It is no longer necessary for anyone to take whatever the producer wants to furnish them in random quantities. During the past 2 weeks, the small plants having mediocre timber and limited manufacturing facilities have been first to feel price reductions that have actually hurt."

The issue of May 15, 1947, which would cover the first two weeks in May makes the following general analysis:

May 15, 1947.

"Green lumber displays the most pronounced price weakness, with no immediate signs of having struck bottom.

"The product of the all-green fir mill is the most difficult to market. An extremely small amount of merchandising activity has been reported by green plants, even those able to furnish well-manufactured lumber in excellent assortments of grade and length.

"With the fir market sinking as rapidly and erratically as it is today, it is almost impossible to point to any one price as being the market."

Then finally the issue of May 29, 1947, which would be the last two weeks in May, states:

May 29, 1947.

"During the past two weeks the green mills have made practically no sale of No. 4 common boards or dimensions, as there is no market for this grade."

When it is recollected that the appellee finally obtained a price for this lumber, which, as to most of it, was only \$4.00 less than the contract price, more than due diligence would seem to be indicated.

In connection with Crowe's Price Reporter we also call attention to this explanation which is made by the editors:

"The prices shown in this compilation are either one price on an item or a spread between two prices as determined from actual sales made by bona fide concerns prior to date of publication. No attempt is made to arrive at a mathematical average of sale prices reported to us. On the contrary, we try to place before our subscribers the prices most commonly being received on transaction made immediately prior to the time the study is conducted, by the greatest number of those contacted in each survey.

"It is not the purpose or intention of this reporting service to establish a market price on any item or in any manner to influence the normal fluctuations of the lumber market."

ARGUMENT

The brief of appellant sets forth two points which are (1) that as a matter of law "the jury could not find that appellee was diligent and timely in the conduct of the resale" and (2) "that there was no evidence that appellee's alleged resales were timely or made in good faith."

We are not able to see any distinction between the two points set forth. The contention seems to be that because Crowe's Price Reporter shows certain prices during the period between April 11, 1947, and June 1, 1947, for 1, 2, and 3 rough or dimension boards of specified lengths that therefore an appellate court must hold as a matter of law, that the failure of the appellee to resell this lumber which also included No. 4 lumber at these prices was conclusive evidence of lack of good faith upon the part of the appellee. As we shall hereafter show, all the authorities cited by appellant are authorities involving situations where the uncontradicted evidence established a higher market than the resale price and also established the fact that such higher price could have been obtained. Such is not the present case.

It may be doubted whether an analysis of these various cases is necessary since their alleged application is predicated upon an erroneous assumption of fact.

Appellant's brief, page 19, quoting from Williston on Sales, states:

"The market price may usually be proved by resale of the goods at the proper time and place and in a fair manner; but the price actually obtained at the resale is not conclusive."

The same thought is thus expressed in 46 American Jurisprudence, page 710:

“In most cases, if the sale is fairly conducted at a proper time and place and there is not evidence of mitigating circumstances or of the unfairness of the resale price, the *amount received on the resale is accepted as conclusive on the question of market value* of the subject matter of the sale, and the measure of the seller's recovery in an action against the buyer for the damages is the difference between the agreed price and the amount received on the resale, plus the expenses properly incidental to such resale.” (Italics ours.)

Here there was no evidence that the sale was not fairly conducted nor is there any evidence of the unfairness of the resale price.

In considering the question of the power of the court to review the jury's decision, the law is well settled that ordinarily this is for the determination of the jury if there is a jury trial:

“Under rules applicable to civil actions generally, question of fact as to which there is a conflict in the evidence must ordinarily be submitted to the jury, as, for example, whether goods were resold within a reasonable time or with reasonable diligence; whether notice was adequate or reasonable; whether the resale was fairly conducted; whether it was so conducted as to procure a reasonable price, and whether the price obtained was reasonable.” 55 Corpus Juris, page 942.

And in 46 Corpus Juris, 717, it was said:

“The question as to what is a reasonable time within which to sell goods after the buyer has refused to receive them is to be ascertained by the character of the property and the circumstances and the market conditions in the particular case; this is usually a question for the jury.”

The assertion of appellant that the question before the court is whether or not appellee exercised good faith and diligence in not beginning to resell until June 3rd is of necessity premised upon the assumption that had the resale started at the time of the breach then the damages would have been nominal.

If this assumption of fact is not sustained by the record then it is unnecessary for the court to pass upon the question sought to be argued. We submit that the assumption is not warranted. As we have shown in our statement of facts there is nothing in the record to show that a better price could have been obtained had appellee started to resell before he did. The quotations from Crowe's Price Reporter which had to do generally with other sales show that at the time the contract was breached there was a demoralized market and sales, particularly of miscellaneous lots of lumber of this character, were difficult to make. There is no evidence of the market price of rough boards or dimension lumber of random width and length during this period and in the absence of such evidence there is no presumption that an earlier sale would have reduced the amount of damage sustained. We therefore do not concede that the record even calls for any determination by the court of the points raised in appellant's argument.

Assuming, however, for the purpose of argument,

that an earlier sale might have produced a greater price, we inquire what, if any, evidence there is concerning the good faith and diligence of appellee in making the resale.

We have already called attention to the fact that the original breach arose out of a telephone conversation. We have shown that there were subsequent conversations between appellee and Powers, the representative of appellant, and also written communications between counsel for the appellant and the appellee which continued until the latter part of May at least. We submit that it cannot be said that while these conversations were going on it was incumbent upon the appellee to immediately attempt to unload this lumber on a falling market. However, even as to that appellee testified that he tried to sell this lumber in both Tacoma and Olympia and other places and that finally he had most of it transported to Tacoma where he thereafter sold it. This was evidence that he diligently sought to make a resale. This evidence was not disputed. Appellant offered no evidence whatsoever. The witness Barr fixed a market price, in part at least, substantially less than the price afterwards obtained. No evidence was offered to the contrary. It is true that appellee did not testify in detail as to the particular concerns to whom he tried to sell this lumber. Let the court bear in mind that this was ungraded rough lumber which had to be

remilled. Appellee testified that "I tried to find other orders where I could have it remilled and disposed of" (R. 72). The fact that on cross-examination he was not asked to testify in detail concerning these efforts could not change the necessary effect of his testimony.

Appellee was also justified in not starting to resell until June 3rd for still another reason. The original notice of the refusal of appellant to accept further deliveries was in a telephone conversation between appellee and Rothstein (R. 70). There were of course no witnesses to this telephone conversation and as a matter of fact, as is shown in the stenographic report of all the evidence on file herein. Rothstein denied that any such conversation had ever occurred. Had appellee begun to sell upon a declining market immediately after this conversation and had the market thereafter begun to rise again he might well have been subjected to a possible suit for damages based upon the claim that appellant had not in fact repudiated the contract. In such event he would have nothing to offer by way of defense except his unsupported testimony concerning this conversation. Appellee therefore did what any ordinarily prudent man would have done. He sought to obtain an unequivocal repudiation or rescission by appellant of the contract which could not be disputed, by talking with Powers, who in some respect was a representative or agent of appellant, and by corre-

sponding with appellant's counsel. He finally secured from appellant's counsel sometime after May 15th a positive written repudiation of the contract. Certainly until this repudiation was definitely and unequivocally established he was under no duty to resell, since all he was required to do was to use reasonable diligence. He did begin to resell within two weeks after he secured positive evidence that appellant had elected to terminate the contract. We submit that nothing more is required.

In the case of *A. B. Small Co. vs. American Sugar Refining Co.*, 267 U. S. 233; 69 L. Ed. 597, the court even went so far as to approve the exclusion of evidence offered by the defendant of specific sales made on the market at a higher price previous to and during the month in which the resale was made. The reason given, among other things, was "that the buying was in relatively small quantities and also on what was deemed a 'hand-to-mouth' plane; and that the particular sales in December were of such character that they would shed no light on the fairness of the resale." The court also said:

"What was proposed to be shown about particular sales in December was rightly excluded. The sales were of a kind that did not tend to establish a standard by which to judge the plaintiff's resale. *Besides, the real question was not whether the plaintiff got the best possible price, or as much as others got in special instances, but whether the*

resale was fairly made in a reasonably diligent effort to obtain a good price. To have admitted the proffered testimony would have tended to confuse and mislead the jury." (Italics ours.)

Inasmuch as appellant's position is predicated entirely upon Crowe's Price Reporter, this case is important. As we have shown, the figures upon which appellant relies were expressly stated not to establish a market and there is nothing to show the quantities or conditions with respect to these sales.

A. B. Small Co. vs. Lamborn & Co., 267 U. S. 248; 69 L. Ed. 597, was a companion case to the *American Sugar Refining Co.* case. In this case the defendant offered the testimony of wholesale dealers in the area concerning the price received by them on particular sales to retail dealers at about the time of the resale which evidence was rejected by the Court. The Court held this not error in the following language:

"We think the ruling was right. The particular sales were in relatively small quantities, many of them under 300 pounds and had no probative bearing on the fairness of the resales. The real question, as stated in *A. B. Small Co. v. American Sugar Refining Co.* *supra*, was whether the resales were fairly made in a reasonably diligent effort to obtain a good price, *and not whether the plaintiff got the best possible price* or as much as others got in particular instances. The unsettled state of the market and the differences between selling small quantities to retail dealers to satisfy immediate needs and selling large quantities to wholesale dealers who

had an oversupply made it necessary to confine the evidence to the real question.” (*Italics ours.*)

This Court reached the same conclusion in *San Francisco Iron & Metal Co. vs. Sweet Steel Co.*, 23 Fed. (2d) 783, which involved a contract for the sale of a substantial amount of steel rails. For the purpose of showing that the market price was higher than the contract price at the time of the breach, the defendant introduced evidence of certain other sales that were made. Concerning this, this Court said:

“Those sales were of small lots sold at retail and they have little value in determining what was the market of the rails when offered in wholesale lots.”

These cases seem to dispose of the argument that the prices reported in Crowe’s Price Reporter conclusively show lack of diligence or good faith upon the part of appellee. They also establish the fact that, if good faith is established, the price obtained at the resale is sufficient to support a verdict, without other evidence of market price. Crowe’s Price Reporter for this period does not show the amount of goods sold or to whom sold, and indeed does not even show the price of lumber purchased under a contract of this character. Appellee was here confronted with the problem of disposing of eighteen carloads of this lumber in a rather isolated section and without the prestige of being supplied by a large concern with trade standing. The

quoted excerpts from Crowe's Price Reporter heretofore referred to show the effect of this situation. For instance, on May 1st, which covers the preceding two weeks, the publication states that "during the past two weeks the small plants having mediocre timber and limited manufacturing facilities have been first to feel price reductions that have actually hurt." And again on April 3rd the publication states that "the further down the line you go in the way of service, that is, the less the mill has to offer in the way of giving the buyer what he wants, the less they are having to take for their goods." Under the doctrine of the *Small Company* cases, *supra*, the figures in Crowe's Price Reporter would not be indicative of anything unless information was given concerning sales transactions by sellers situated in somewhat the same position as was appellee when this contract was breached.

An extended review of the specific facts in cases involving the application of these principles would seem to be unnecessary, since each case depends upon its particular facts. Appellant seems to assert, however, that the Washington decisions as a matter of law require a reversal of the decision of the Court below. A review of them therefore seems to be appropriate.

THE WASHINGTON CASES

Hess vs. Seitzick, 95 Wash. 393; 163 Pac. 941, is cited. In that case the only thing decided was that the lower Court erred in instructing the jury that, if the jury found that the buyer had breached the contract, then it should return a verdict for the difference between the contract price and the amount which the buyer realized upon a sale made upon a declining market three months after rejection of the goods by the buyer. The Court called attention to the fact that there was evidence in the case "that the butter could have been resold at the time of, or within a reasonable time after the rejection, and in fact for about two months thereafter, at considerably more than the contract price, of which, so far as the evidence goes, the respondent failed and refused to avail himself." Notwithstanding this the issue was not submitted to the jury. All that was decided was that this was a question for the jury.

Here the issue was submitted to the jury and here also, unlike the *Hess* case, there was evidence of efforts made by Feak to sell the lumber and no evidence that he did not obtain the best price under the circumstances.

Washam vs. Wood, 177 Wash. 183; 31 P. (2d) 508, is also cited. This case was tried before the Court and not before a jury, and under Washington practice the State Supreme Court may consider such cases de novo,

although the usual presumption of correctness is given to findings of fact of the Court below. The item of \$200.00 damage was disallowed for the reason that “according to respondent’s own testimony the market value of the wheat when it was threshed was \$34.00 per ton, the contract price.” In other words, the seller conceded that he could have sold the goods at the time and place of breach at the contract price. Obviously under such a concession he could not recover damages. No such concession was made here.

Hartman Pacific Co., Inc. vs. Estee, 127 Wash. 151; 219 Pac. 867, is cited. This case was also tried before the Court and not before a jury. This involved the resale of salmon. The first sale was made four months after notice of election to resell and the last sale sixteen months thereafter. The manager of the seller testified that he could have sold the goods at the prevailing market price, which was conceded to be about \$2.00 per dozen, during the first two months of the period, and other witnesses, whose testimony was not contradicted, testified to the same effect. In other words, there was no conflict in the record on the question.

Fosseen & Co. vs. Kennewick Supply & Storage Co., 144 Wash. 67, 256 Pac. 779, is cited. This, unlike the other cases, was a jury case. In that case, however, the only evidence introduced was the market price of the product at the time of resale “some two years later

than the time of the breach." The Court properly concluded that this was too remote from the time of the breach and also called attention that the evidence showed that the market price was subnormally high at the time of the purchase but "*that had it been sold at any time in the year 1923 the loss would have been nominal.*" There is no such evidence here.

The case of *Hughes vs. Eastern Ry. & Lbr. Co.*, 93 Wash. 558, 161 Pac. 343, is also cited and quoted from. This case directly supports the position of appellee. The suit was a suit for damages brought by the seller against a buyer who had refused to receive certain logs. The defendant by way of defense sought to show that, after the breach, the seller had sold the logs to another concern at a price more advantageous than the original contract and that therefore no loss had been sustained. The lower Court refused to admit the evidence. This was held error. After stating the general rule set forth on page 11 of appellant's brief that the seller must be diligent, the Court said:

"In the case at bar respondent was not deprived of his goods by the breach of defendant. It follows that evidence of a market was competent and should have been received. *A resale is competent evidence to prove a market.*" (Italics ours.)

This quotation shows that, in Washington at least, whatever may be the rule in some other jurisdictions, that if ordinary diligence is shown it is sufficient for

the seller to prove the price received at the resale without general evidence of the market in the product.

The Washington Court has not hesitated, when the occasion required it, to disregard the general rule that the measure of damage is the difference between the market price and the contract price. *Poston vs. Western Dairy Products Company*, 179 Wash. 73; 36 P. (2d) 65, involved the breach of a contract between a milk distributor and a producer to purchase the producer's milk. The contract was breached by the distributor, and the producer, in order to minimize his loss, formed a distributing organization. In a suit brought by the producer for damages he was allowed to include the cost of setting up the distributing organization and loss of sales. The Washington Court in considering this said:

“Appellant contends that the measure of damages applicable was the difference between the contract price and the market value of the milk. The difficulty with the application of the rule in the instant case is that there was no market for bottled milk of the Stadocona and Waikiki quality, except on the doorsteps of householders in Spokane. When, through the acts of appellant, respondents were deprived of that market, they faced the alternative of selling their product as bulk milk or building up a distributing organization of their own. The former course spelled ruin, for, as bulk milk, their product would have returned little more than half of the daily cost of operating their dairy. They chose the latter alternative with the result that, within ninety days, they had resuscitated their business to

a volume equal to that just prior to the time appellant breached the contract. None the less, appellant contends that respondents, under the rule, were bound to sell their product as bulk milk and take their loss. We do not think the rule is so rigid as all that. *After all, the underlying theory of damages is fair compensation for the injury—not protection for the one inflicting it.*" (Italics ours.)

While we do not contend this case to be in point upon the facts, the facts in the two cases has some analogy. Feak was not a manufacturer of lumber, of which fact the appellant was advised.

Crowe's Price Reporter establishes the difficulty of a person, operating as did Feak to sell this product, which was second-growth timber, and which under the contract was purchased by Feak without grades and of random lengths. The principle of the *Poston* case is applicable although the facts to a certain extent are different.

Likewise the Washington Court has held, in a considerable number of cases, that where there is no market at the place of delivery or where the goods cannot reasonably be resold, that the seller is entitled to recover the full contract price.

State Finance Company vs. Hamacher, 171 Wash. 15; 17 P. (2d) 610;

Foster vs. Montgomery, Ward & Co., 24 Wn. (2d) 248; 163 P. (2d) 838;

Parks vs. Elmore, 59 Wash. 584; 110 Pac. 381.

In *Parks vs. Elmore*, supra, the Court also made the following observation:

“If the appellant knew of a market he was morally obligated to point it out to the respondent, and failing in this, it would seem that he was not in the best possible position to claim lack of diligence on the part of respondent.”

Appellant now relies on Crowe's Price Reporter, which is published in Portland and which city is the principal place of business of appellant. If the market was as claimed by the appellant, then was he not obligated to inform the appellee of this market, if one existed?

The plain truth of course is that there was in effect little or no market for lumber of this kind situated in this locality. The justifiable and necessary inference from the record is that the appellant, when the market began to slide, recognized what a difficult task it would be to handle this lumber on the market and that that was the reason why appellant, without just cause, repudiated the contract. It is clear also that the reason the appellant offered no evidence upon this issue, which was specifically tendered to it by the pleadings previous to trial, was that it realized that the appellee had done an extraordinarily good job in minimizing damages, and that if any evidence was offered it would simply accentuate and prove that unusual diligence had in fact been exercised.

OTHER AUTHORITIES CITED BY APPELLANT

We think it is unnecessary to undertake a detailed analysis of the facts of certain miscellaneous decisions of some other courts cited in appellant's brief, since each case involves different facts and circumstances. However, a short discussion may be justified.

In *Shelton v. Argos Mercantile Corp.*, 194 App. Div. 472, 185 N. Y. Supp. 513, the uncontradicted evidence was that the seller could have sold the goods in Cuba at a price exceeding the contract price, but instead of this he chose to speculate and shipped the goods to France where a portion of them at least was lost at sea. The conceded fact that the seller chose to speculate instead of selling in an available market completely makes the case inapplicable here.

It is asserted that *Chozo Yano, et al. v. Ledman, et al.*, 188 N. Y. Supp. 764, is in all fours with the case at bar. This decision was by a City Court of New York and, as is pointed out in the brief, was thereafter reversed for reasons here immaterial. The Court concludes that because "the market as proven upon the day of delivery was \$19.50 apiece" that therefore damages based upon a resale made thereafter could not be allowed. The facts with respect to the proof do not appear in the opinion but the decision in any event completely ignores the question of diligence and good

faith and is directly contrary to the statement of the Supreme Court of the United States in the *American Sugar Refining Company* case, supra, where that Court said that the question “was not whether the plaintiff got the best possible price, or as much as others got in special instances, but whether the resale was fairly made in a reasonably diligent effort to obtain a good price.”

Worcester Bleach & Dye Works v. Dlugasch, 181 N. Y. Supp. 44, and *Magnes v. Sioux City Nursery & Seed Co.*, 59 Pac. 879, are also cited. The *Worcester* case expressly held that “it is unnecessary for us to determine whether, if there was an available market in New York City * * *, the plaintiff would be entitled to recover the difference between the agreed price of the chemicals and the price he actually obtained * * *.” The Court then stated that, assuming that the plaintiff could sell as defendant’s agent, he could still not recover for cartage, storage and personal expenses in view of the fact that there was no evidence in the record that such items were necessary. Two judges concurred in the result.

In the *Magnes* case no evidence was introduced concerning the resale. As stated by the Court “how, when, or to whom, and whether at public or private sale.” The Court then rightfully concluded that good faith was not shown. Here the price, the time and the buyer

to whom the goods were sold were all identified and established by the evidence.

Derami, Inc. v. John B. Cabot et al., 273 App. Div. 717, 79 N. Y. S. (2d) 664, is elaborately quoted from on pages 20 and 21 of appellant's brief. The only thing which was decided there was that evidence of a resale could not be used to establish a market price. This is shown by the quotation on page 21 of appellant's brief where it is said "there is no testimony in the case by anyone familiar with the business concerning whether there was an available market for the goods. If there was no such market, the price on resale could not be regarded as evidence of market value." If this is the New York rule then it is directly contrary to the rule announced by the United States Supreme Court in the *A. B. Small* cases before referred to, which, as we have shown, limit the inquiry to the question of whether or not reasonable diligence was shown, and is also directly contrary to the statement of the Washington Court in *Hughes vs. Eastern Ry. & Lumber Co.*, 93 Wash. 558-562, 161 Pac. 343, where the Court said "*the resale is competent to prove a market.*"

It is also contrary to the decision of this Court in the case of *San Francisco Iron & Metal Co. vs. Sweet Steel Co.*, 23 Fed. (2nd), 783, where this Court quoted the following paragraph from Ruling Case Law:

“He may resell at any time and in any state of the market, and the fact that he refrains from selling them for several months on a falling market does not prevent him from recovering in an action against the buyer for the deficiency.”

The New York Court in effect admits that the decision is inconsistent, in part at least, with the decision of Circuit Judge Larned Hand of the Second Circuit in the case of *Farrish Co. vs. Madison Distributing Co.*, 37 Fed. (2d) 455, in which case it was held that if diligence was shown it was not necessary to show an available market other than evidenced by the resale.

In *Arkansas Shortleaf Lumber Co. vs. Hemler*, 281 Fed. 914 (8th Circuit), it was held that where there was no evidence of the market price of the goods which the seller had resold after a repudiation by the buyer, that the price obtained at the resale should be regarded as the market price, the seller having used due diligence and made all reasonable efforts to obtain a fair price.

See also Section 46, American Jurisprudence, page 710, where it was stated, among other things, that “the amount of the resale is, properly speaking, evidence of the market value of the goods,” and where it was further stated that if the resale was fairly conducted and there was no evidence of its unfairness “the amount received in the resale is accepted as conclusive on the question of market value of the subject matter of the sale.”

The Court will find this question elaborately considered in a note in 44 A. L. R. and particularly a discussion beginning on page 308 under the sub-heading of "presumption as to resale being for full market value."

This note was supplemented in 119 A. L. R. 1141 with a reference to many decisions of the State and Federal Courts and also to Canadian decisions.

Frankel vs. Foreman & Clarke, 33 Fed. (2d) 83, a decision of the Second Circuit is also cited. The real basis of this decision was the admitted failure of the seller to resell certain coats on November 16th at the height of the season, which was followed by a sale on December 7th where there was a low market. The quotation from the appellant's brief, "that if the testimony showed that the market had fallen between the date of the breach and the time of resale, then there could be no recovery based upon the resale," (App. Brief 23) must be read in connection with the conclusion of the Court that the uncontradicted evidence there showed lack of diligence. If the decision is otherwise construed, then it has been overruled by *Farrish vs. Madison Dist. Co.*, 37 Fed. (2d) 455.

If the opinion be construed otherwise, then it is also squarely in conflict with the two *Small* cases which we have referred to which specifically hold that the plain-

tiff is not required to show that he “got the best possible price” or with the statement of this Court in the *San Francisco Iron & Metal Co.* case to the effect that “the fact that he refrains from selling them for several months on a falling market” will not defeat recovery.

Obrecht vs. Crawford, 175 Md. 385, 2 Atl. (2d) 1, simply announces the general rule that a resale must be made within a reasonable time and that reasonable care and diligence must be used. The case does not deny the right of a diligent seller to take reasonable time to resell even though on a falling market.

Crawford vs. Dahlenberg, 221 Mo. App. 600, 283 S. W. 65, is obviously no authority here. That case involved a commodity which had no available market at the place of acceptance. The seller shipped the goods to the nearest available market with definite instructions to sell at not less than the contract price. It was held that this limitation showed lack of diligence. This conclusion seems quite sound. The facts here are entirely different. Feak got considerably more for this lumber than the market in May and June, as testified to by the witness Barr, which certainly showed that he exercised diligence. There is no evidence that he put a minimum price upon the resale price.

CONCLUSION

In conclusion attention is called to the apparent discrepancy between the points as stated in appellant's brief and one or two of the cases cited. The statement of the points involved correctly state the issue and that is whether there is evidence to support the jury's finding that appellee exercised diligence and resold in good faith. The idea is suggested on pages 20 to 24 of appellant's brief that the seller must, in addition to showing diligence and good faith, also show that there was a market and that the resale was not less than the market. We have already discussed this in detail but we now refer to it again in order to point out that the statement of points to be relied upon does not cover any such contention. Therefore under familiar rules, the point may not now be considered.

It is submitted that the judgment should be affirmed.

Respectfully submitted,

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United States
COURT OF APPEALS
for the Ninth Circuit

PORTLAND-COLUMBIA LUMBER CO.,
a Corporation,

Appellant,

v.

J. W. FEAKE, d/b/a J. W. FEAKE MERCAN-
TILE COMPANY,

Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the United States for
the Western District of Washington, Southern Division.

FILED

NOV - 2 1950

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United States
COURT OF APPEALS
for the Ninth Circuit

PORTLAND-COLUMBIA LUMBER CO.,
a Corporation,

Appellant,

v.

J. W. FEAKE, d/b/a J. W. FEAKE MERCAN-
TILE COMPANY,

Appellee.

Appeal from the District Court of the United States for
the Western District of Washington, Southern Division.

REPLY BRIEF OF APPELLANT

Appellee's brief (p. 17*) reiterates the basic proposition of law expounded in appellant's main brief (Point II), "*If good faith is established*, the price obtained at the resale is sufficient to support a verdict without other evidence of market price." (Italics ours)

*Page references are to appellee's brief unless otherwise indicated.

To establish his good faith, appellee undertakes to explain:

why no resale was made until June 9th although the breach occurred in March (pp. 13-15); and why the amounts realized on the resales were less than the market quotations reported in Crow's Digest (pp. 4-6, 12).

It is respectfully submitted that, instead of accomplishing his purpose he has, in fact, demonstrated appellant's thesis: That there is no evidence in the record of appellee's good faith in effecting the resales and, therefore, no basis for the jury's verdict and the judgment entered thereon.

POINT I

Appellee's Delay in Effecting the Resales

Appellee inquired (p. 13), as we did, "What, if any, evidence there is concerning the good faith and diligence of appellee in making the resale." Every single assertion he makes in reply to that inquiry is totally without foundation in the record. The absence of any reference to the record on pages 13, 14 and 15 of appellee's brief is the most glaring admission of the unsoundness of appellee's position.

Repeatedly, appellee seeks to make it appear (pp. 4, 13, 14) that there was some "general discussion" following the breach and continuing until May 15th which justified appellee in deferring his resales until some time thereafter.

The fact is that there was no such discussion; and the letter of May 15th mentioned in Exhibit 8 (R. 115-116) which appellee describes as "a positive written repudiation of the contract" which "he finally secured from appellant's counsel some time after May 15th" (p. 15) was simply a notice that "this lawsuit would be filed" (R. 85). Appellee's attempt thus to justify his delay by tying it to a letter which is not even in the record discloses the fatal weakness of his position. For regardless of what that letter of May 15th said, one thing is clear: it is not in the record. And the absence of that letter and of any other evidence of justification for appellee's delay in making the alleged resales is precisely why the verdict and the judgment entered thereon were improper (main brief, Point II*).

On the other hand, the record is full of testimony by the appellee showing that he knew in March that the contract had been unequivocally breached. At page 98, he said (*italics ours*):

"A. No, at the time the third car was refused and *I knew there was no hope of getting Mr. Rothstein to take it*, there was that much lumber accumulating and further shipments to the side track were stopped simultaneously with the knowledge that Mr. Rothstein would not take the third car.

Q. You testified yesterday it was late in March, not later than March 30th?

A. I will let that answer stand."

Again on page 79, Feak testified:

"A. I called Mr. Rothstein on the third car, the same as the first two.

*Appellant's main brief will be cited throughout in this manner.

Q. And that was between the 20th and 30th of March?

A. Yes.

Q. And he told you he wasn't going to take any more four-inch lumber?

A. Yes; he refused to give me shipping instructions and said he wouldn't take any more lumber.

* * * *

Q. Did Rothstein then indicate to you that he wouldn't take one and two-inch lumber?

A. My recollection is that he did. That either Mr. Powers or Mr. Rothstein said he wouldn't take one and two-inch and I am almost positive that Mr. Rothstein would not take any more lumber."

This and other testimony of the appellee (R. 70, 81, 86, 87) shows the disingenuousness of appellee's argument (p. 14) that there was some doubt as to whether appellant had "in fact repudiated the contract".

Unless appellant unequivocally breached the contract in March, appellee was obligated to deliver one and two-inch lumber to Carlson's mill in Vancouver without further instructions (R. 86). He never did; and the statement (pp. 14-15) that Feak "sought to obtain an unequivocal repudiation * * * by talking with Powers * * * and by corresponding with appellant's counsel" after March 30th is a bare-faced misrepresentation of fact. But fact or not, the important thing about it is that it is *not* a fact of record, and, therefore, not available to support the verdict.

It is worth noting the inconsistency between this argument of appellee to justify his delay and the immediately preceding portion of his brief, in which he attempts to demonstrate his diligence. The date of the efforts appellee allegedly made "to sell this lumber in

Tacoma and Olympia and other places" (p. 13) is fixed by his testimony (R. 72) that "I finally sold, *months later*, the lumber that I had transported to Tacoma". The first resale occurred on June 9th, and if that was "months later" it must follow that the earlier efforts were made in March or April. Thus, on the one hand, appellee seeks to construe the record as showing efforts on his part to make sales during March and April and, on the other hand, he argues that he waited to make any sales until after there had been a "positive written repudiation of the contract" about May 15th which is *not* a matter of record.

And it is significant that appellee feels called upon to acknowledge (p. 13) that "he did not testify in detail as to the particular concerns to whom he tried to sell this lumber" and to suggest that the burden rested on appellant to remedy this defect in his testimony by bringing it out on cross examination (p. 14).

It would have been vain for appellant to attempt to elicit the details of appellee's alleged efforts at resale, as the following excerpt from his cross examination clearly demonstrates (R. 97-8, cf. 104):

"Q. Is it your statement that you were unable to sell any of this lumber before June 9th? Just yes or no, Mr. Feak?

A. Yes; at the price I finally received. (103)

Q. In other words, at any time prior to June 9th it would have been impossible for you to sell this lumber for \$32.50 a thousand, or more?

A. I got forty dollars for it.

Q. Yes or no, Mr. Feak?

A. On part of it, yes, on part of it, no.

Q. All right. Now, I take it then that you refer to the fact that part of this was sold at \$32.50 and part at \$40.00.

A. Yes.

Q. Now, as to the part sold at \$32.50, is it your statement that you could not have sold that for \$32.50 or more prior—what was the date of that sale?

A. That sale was—I don't have the dates of the sale here. My bookkeeper is here. He could give it to you. You can ask him.

Q. Well, but it wasn't before June 9th?

A. No; it wasn't.

Q. Was it before July 9th?

The Court: He says he doesn't know, Mr. Reinhardt, and we will just put in a lot of time.

Mr. Reinhardt: All right."

The fact is that even the A. B. Small Company case (pp. 15-16) on which appellee relies so heavily, explicitly mentions the extremely detailed nature of the evidence offered by the seller there regarding his diligence in making the resales, saying (45 S. Ct. at p. 303):

"We are of opinion that the evidence as set forth in the record conclusively established that the resales were made within a reasonable time. The state of the market was such that it was difficult to make any sales; and the quantities to be sold enhanced that difficulty and also the need for care. The witnesses for the plaintiff described with much detail the efforts which were made, and the evidence as a whole reasonably admitted of no other conclusion than that the efforts were timely, well directed and persistent. Many bids were received, but almost all were so low that their acceptance would have meant a great sacrifice. The defendant was notified of the purpose to resell, but made no effort to advance it in point of time or to bring in a purchaser at an acceptable price. Considering the

state of the market, the outcome appears to have justified both the time and care taken by the plaintiff."

To the same effect see the Obrecht case (main brief, pp. 18-20).

Appellee's brief will be searched in vain for *any* statement supported by record reference offering any justification for a lapse of almost three months between the date of the breach and the date of the resale. It is clear, as a matter of law, under the cases cited, both by appellant and by appellee, that in the absence of some such evidence, a verdict cannot be based upon the price realized on a resale.

POINT II

The Evidence Regarding Market and Market Prices Between the Date of the Breach in March and the Date of the Resales Commencing in June

Although it is not offered as a justification for appellee's delay in making these resales, it is true that if the resales had been made at prices as high as the market prices prevailing during a reasonable period following the date of the breach, that fact would be evidence of appellee's good faith and diligence in minimizing damages (cf. p. 12). Therefore, in order to justify a verdict based upon the resale price rather than the market price, it was incumbent upon appellee to offer such evidence. *Frankel v. Foreman & Clark*, 33 Fed. (2d) 83, 2 Cir. (1929) (main brief, pp. 22-23). Without such evidence

the market price (main brief, Point I), not appellee's resales (main brief, Point II), is the measure of his recovery.

Accordingly it is only natural that evidence of what the market was during the period between the breach in March and the resale in June should have been introduced by appellee (cf. pp. 5, 6, 13). Appellee's misfortune is that this evidence of a market at and following the date of breach establishes a market price higher than the amount realized on the resales, thereby discrediting his own testimony regarding his alleged attempts to resell this lumber prior to June (pp. 4, 13-14). It was not necessary, therefore, for appellant to dispute appellee's testimony on that point, or to offer evidence thereon. That burden was discharged by appellee.

Appellee offered in evidence copies of Crow's Price Reporter for the period from March 19th on (Ex. A-4). Those publications show that for a period of at least six weeks following the breach, the market price was in excess of the contract price of this lumber (main brief, p. 4).

Appellee dismisses these quotations from Crow in favor of the testimony of the "disinterested"* witness (p. 5) Barr, who stated that the price of rough cants in May and June would run from twenty-five to thirty-five dollars and rough boards and dimension lumber five dollars more (R. 108-110). The price reported by Crow which Barr said "is based on information obtained from (Bucoda) and from other mills like yours" (R. 111) was

*Barr was an employee of Bucoda, the firm to which Feak sold this very lumber (R. 107).

far higher both in the category "Rough Green Plank & Small Timbers" and "Rough for Remilling". Investigation of this apparent discrepancy between Barr's testimony and Crow's price quotations was cut off by the Court (R. 111) and the Court itself observed as to a question asked Barr about prices during April: "[It] is almost self evident that the witness can't remember" (R. 122).

Thus, there is no evidence whatever regarding the market price of this type of lumber in *April* other than Crow's Price Reporter, and no credible evidence other than Crow's regarding market prices in May and June. The "explanation" by Mr. Barr quoted in appellee's brief (p. 6, see also pp. 10-12) that Crow's prices are "correct for specified lengths" but not for random lengths is directly contrary to the facts. The fact that Crow's quotations are for random lengths and widths is demonstrated by Crow's repeated explicit reference to "specified lengths" when that is what the price quoted applies to (*expressio unius, exclusio alterius*).

One thing the witness Barr did state unequivocally:

"Q. But whether that lumber can be disposed of to a local buyer, certainly those quotations indicate that it could be disposed of on the West Coast at the prices in these specified lengths?

A. Yes, sir.

Q. And that is true of all the other information contained in here?

A. It is close." (R. 113)

Furthermore, the appellee himself testified about Crow's quotations:

"Q. Those figures indicate the market during those respective periods, do they not Mr. Feak?

A. They indicate a falling market; yes.

Q. Whether it was rising or falling, those were the prices at which transactions occurred during that time, weren't they?

A. I assume so." (R. 101)

Thus, in this aspect, at least, the instant case resembles those "cited by appellant * * * where the uncontradicted evidence established a higher market than the resale price and also established the fact that such higher price could have been obtained." (p. 10).

Crow's price quotations make it apparent that \$32.50 a thousand was not a fair price for this lumber (p. 5) even at the time appellee sold it. It certainly is far below what could have been realized during a reasonable period following the breach for cants, or, at any time, for boards and dimension lumber of grade #3 and better of random lengths.

Here, as elsewhere, appellee runs afoul of the record. He says (p. 4, see also pp. 5, 9): "As is correctly stated in appellant's brief (page 3) most of the lumber was sold at a price of forty dollars per thousand." The Court can examine page 3 of appellant's brief, as we did, but nowhere will it find such a statement because the statement is not true. And it would not be true even though, by inadvertence, it did appear in appellant's main brief. Appellee's very first sale of 232,078 feet in one batch on June 9th (R. 124) for thirty-three dollars a thousand constituted more than half of all the lumber here in question.

It is true that most of the *sales* (but not most of the

lumber sold) were at \$40.00 a thousand. But two individual sales, the one of June 9th of 232,000 feet at \$33.00 a thousand and the one of 64,000 feet to Bucoda Lumber Company at \$32.50 a thousand, together account for almost all of appellee's alleged loss outside of the hauling item. It is submitted that this circumstance by itself raises a question as to appellee's diligence and good faith (R. 104). Certainly, in the context of this record, these two sales are not entitled to be taken at face value without some explanation. The record contains none, unless it be appellee's assertion (p. 10) that the lumber he "resold" graded as low as number 4. As usual, his statement is not supported by any reference to the record. If true, however, it may explain why appellee was not able to resell at the contract price (p. 8); and it certainly explains why the amount he realized is not a measure of his recovery.

By his own testimony, this lumber was supposed to be of the same grades "as formerly shipped" (R. 66, 118). The twenty-six invoices (Ex. 4 A-Z, R. 3) which covered the lumber "formerly shipped" show grades in each instance; and in no instance is there any grade below number 2. That portion of the stenographic transcript of Feak's testimony which, although part of the record before this Court (R. 56), was not printed, is full of testimony showing that the lumber was sold on grade (p. 12, lines 17-22, p. 13, line 20, pp. 56-73 of stenographic transcript of Feak's testimony). Thus, Feak's own testimony gives the lie to his assertion that (p. 2) "the contract did not call for any particular grades". Rather than providing a justification for the low price realized on the resale,

appellee's assertion (p. 13) "that this was ungraded lumber" shows, beyond any possibility of dispute, that the verdict based upon the prices alleged to have been realized on these alleged "resales" cannot be allowed to stand because the lumber did not conform to the contract.

POINT III

Appellee's Discussion of the Authorities

As we stated at the outset, there appears to be complete agreement between appellant and appellee upon the basic proposition of law. In addition to the language quoted on page 1 *supra* from page 17 of appellee's brief, he reiterates the proposition on page 21 of his brief "*that if ordinary diligence is shown, it is sufficient for the seller to prove the price received at the resale.*" Since it is clearly demonstrated by this record that ordinary diligence is *not* shown, we deem it unnecessary to comment on appellee's discussion of the Washington cases (pp. 19-24).

However, special attention should be paid to appellee's discussion (pp. 25-30) of the other cases cited in appellant's main brief, particularly (p. 27) the Derami case. Throughout his discussion of the authorities, as throughout the discussion of the evidence, appellee persistently slurs over the important qualifying clause, "if diligence was shown". This is strikingly illustrated on page 28 of appellee's brief: In the first paragraph, the qualifying clause is "if diligence was shown"; in the second, "the seller having used due diligence"; and the third, "if the

resale was fairly conducted". The same qualifying language appears in the discussion of every case from page 27 on; and the reference to the A. B. Small cases in appellee's discussion of the Derami case shows that even those cases propound "the question of whether or not reasonable diligence was shown" (p. 27) by the seller.

Thus, we are brought back to appellant's basic argument, which is that the record is totally devoid of any evidence of reasonable diligence on the part of the appellee in making these resales. Whatever evidence there is in the record on that subject indicates a wanton lack of diligence. It follows, as a matter of law, that the record does not support the verdict, and the judgment entered thereon must be reversed and the judgment reduced to a nominal sum or a new trial ordered to establish the amount of appellee's recoverable loss, if any.

Respectfully submitted,

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Attorney for Appellant.

